122-597

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 290.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES HARRIS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED SEPTEMBER 9, 1884.

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1 THE DENVER AND RIO GRANDE RAILWAY COMPANY
vs.
JAMES HARRIS.

Supreme Court of the Territory of New Mexico.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, Plaintiffs in Error,
vs.
JAMES HARRIS, Defendant in Error.

Be it remembered that heretofore, to wit, on the eleventh day of December, A. D. 1883, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico the following transcript of the record of the district court of the first judicial district of said Territory within and for the county of Santa Fé, in the above-entitled cause, which said transcript was and is [in] the words and figures following, to wit:

2 *Transcript of Record.*

In the Supreme Court of the Territory of New Mexico.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, Plaintiff in Error, *vs.* JAMES HARRIS, Defendant in Error. } Trespass.

Breeden and Waldo, attorneys for plaintiff in error; Gildersleeve & Knaebel, attorneys for defendant in error.

Præcipe for Writ of Error. Filed March 21st, 1883.

TERRITORY OF NEW MEXICO,
First Judicial District, County of Santa Fé:

Be it remembered that heretofore, to wit, on the thirty-first day of October, A. D. 1881, James Harris, by his attorneys, Messrs. Gildersleeve and Knaebel, filed in the clerk's office of the first judicial district court of the Territory of New Mexico within and for
3 the county of Santa Fé his declaration in trespass, which said declaration is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, *County of Santa Fé,* } *ss:*

In the district court for the first judicial district of the Territory of New Mexico, sitting within and for the county of Santa Fé for the trial of causes arising under the laws of said Territory, at the February term, eighteen hundred and eighty-two (A. D. 1882).

To the Hon. L. Bradford Prince, chief justice of the supreme court of the Territory of New Mexico and judge of the first judicial district court thereof:

Your petitioner, James Harris, plaintiff herein, a resident of the county of Santa Fé, in the Territory of New Mexico, complains of

the Denver and Rio Grande Railway Company, a corporation created, organized, and existing under and in pursuance of the laws of the State of Colorado and of the United States of America—

For that whereas heretofore, to wit, on the eleventh day of June, in the year eighteen hundred and seventy-nine, on the line of railroad known as the Denver and Rio Grande railway, at Cu-
4 charas, in the State of Colorado, to wit, in the county of Santa Fé, in the Territory of New Mexico, while the said plaintiff was lawfully in the employ of the Atchison, Topeka and Santa Fé Railroad Company, a corporation organized and then existing under and in pursuance of the laws of the State of Kansas and of the United States of America, as a watchman, and as such was lawfully upon the said railway, to wit, in a hand-car propelled and running thereon, at Cucharas aforesaid, to wit, in the county of Santa Fé aforesaid, the said defendant, with force and arms and by means of its servants and agents, unlawfully and wrongfully made an assault upon the said plaintiff, and beat, bruised, wounded, and ill-treated him, and shot and discharged divers rifles, guns, pistols, and other fire-arms then and there loaded with gunpowder and leaden bullets, which said rifles, guns, pistols, and other fire-arms so loaded the said defendant, by its said servants and agents to that end incited, employed, instigated, and directed by the said defendant, then and there aimed and held at and against the said plaintiff, and thereby then and with shot, to wit, a leaden bullet, struck and wounded the said plaintiff in so grievous a manner that his life was by means thereof greatly dispaired of, and by
5 reason of such wounding the said plaintiff then and there became lame, sick, and disordered, and continued so lame, sick, and disordered for a long time, to wit, from thence hitherto; and during all that time the said plaintiff thereby suffered great pain, and was rendered incapable of following and transacting his necessary affairs and business by him during that time to be done, and as a direct result of such shooting, wounding, wrong, and injury became and is permanently crippled.

And also for that the said defendant, on the day and year aforesaid, with force and arms, &c., made another assault on the said plaintiff, to wit, at Cucharas aforesaid, to wit, in the county of Santa Fé aforesaid, and then and there again beat, bruised, wounded, and ill-treated him, insomuch that his life was then and there greatly despaired of, and other wrongs to the said plaintiff then and there did, against the peace and dignity of the said Territory and to the damage of the said plaintiff ten thousand dollars. Plaintiff therefore brings suit and asks the judgment of this honorable court for said sum of ten thousand dollars, together with costs of suit.

GOLDERSLEEVE & KNAEBEL,
Attorneys for Plaintiff.

6 And afterwards, to wit, at a regular term of the district court of the first judicial district of the Territory of New Mexico, begun and held within and for the county of Santa Fé, at the court-house of said county, in the city of Santa Fé, on the sec-

ond Monday of July, in the year one thousand eight hundred and eighty-two, for the trial of causes arising under the laws of said Territory, and on the seventh day of said term, the same being Monday, July 17, the following, among other, proceedings were had, to wit:

JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass. 1280.

Now comes the said defendant, by its attorneys, T. F. Conway and William Breeden, Esquires, and enters its appearance herein.

And afterwards, to wit, on the 12th day of February, A. D. 1883, the said defendant, by its attorneys, filed in the clerk's office aforesaid its plea, which said plea is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO:

First Judicial District Court, County of Santa Fé. February Term, 1883.

7 JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass.

And the said defendant, by its attorneys, comes and defends the force and injury when, &c., and says that it is not guilty of the said supposed trespasses above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it, and of this it, the said defendant, puts itself upon the country.

BREEDEN AND WALDO,
Att'ys for Defendant.

And the plaintiff doth the like.

GILDERSLEEVE & KNAEBEL,
Plaintiff's Attorneys.

And afterwards, to wit, at a regular term of the district court of the first judicial district of the Territory of New Mexico, begun and held within and for the county of Santa Fé, at the court-house of said county, in the city of Santa Fé, on the first Monday of February, in the year one thousand eight hundred and eighty-three, for the trial of causes arising under the laws of said Territory, and on the 23 day of said term, the same being Friday, March 2, 1883, the following, among other, proceedings, were had, to wit:

8 JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass. 1280.

Now comes the said plaintiff, by his attorneys, Messrs. Gildersleeve and Knaebel, and the said defendant comes by its attorney, William Breeden, Esquire, and issue having been heretofore joined between the parties, thereupon comes a jury, to wit:

Alejandro Mora, Lorenzo Romero, Maximo Martinez, Manuel Apodaca, Sabina Salas, Juan Jose Salazar, Jose Gabriel Ortiz, Juan Jose Romero, Jesus Maria Padilla, Benigno Ortega, Giullermo Gonzales, and Lucas Archuleta, twelve good and lawful men of the body of the county, who being duly sworn the truth to speak upon the issues joined between the said parties, hear the evidence, the arguments of counsel, and the instructions of the court, and retire to deliberate upon their verdict.

And afterwards, to wit, at the same term last aforesaid, and on the twenty-fourth day of said term, the same being March 3, 1883, the following, among other, proceedings were had, to wit:

JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass. 1280.

9 And now again comes the said parties, by their respective attorneys, and again comes the jurors heretofore empanneled herein, and upon their oaths aforesaid say that they find in favor of the said plaintiff and assess his damages at nine thousand dollars.

And afterwards, to wit, on the same day of the said term last aforesaid, the same being Saturday, March 3, 1883, the following further proceedings were had, to wit:

JAMES HARRIS
vs
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass. 1280.

Now comes the defendant, by its attorney, Henry L. Waldo, Esquire, and moves the court to arrest the judgment upon the verdict heretofore rendered herein, for reasons set forth in its motion on file; and said motion being submitted to the court without argument, and the court being sufficiently advised in the premises, denies the same.

It is therefore ordered by the court that the said motion be, and the same hereby is, denied.

It is therefore considered by the court that the said James Harris recover of the said The Denver and Rio Grande Railway Company the sum of nine thousand dollars, the amount of the dam-
10 ages heretofore assessed by the jury herein, together with his costs in this behalf to be taxed, and that he have execution therefor; and it is further ordered by the court that the execution in this case, be, and the same hereby is, stayed for the period of sixty days, and that the said defendant be, and it hereby is, given sixty days in which to file *his* bill of exceptions herein.

And afterwards, to wit, at Mora, New Mexico, Tuesday, March 27, 1883, in chambers, the following proceedings were had, to wit:

JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass. 1280.

On motion of the said defendant, by its attorney, William Breeden,

Esquire, for reasons set forth in its motion on file, it is ordered by the court that the time for filing the bills of exceptions in this cause be, and the same hereby is, enlarged until the first day of June, 1883.

And afterwards, to wit, in chambers at Santa Fé, New Mexico, May 2, 1883, the following proceedings were had, to wit:

JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } 1280.

11 The time to perfect the appeal in the above-entitled cause is extended for thirty days from May 2nd, 1883, and a further stay of execution — for said length of time in said cause.

S. B. AXTELL,
Chief Justice, &c.

And afterwards, to wit, in chambers at Santa Fé, New Mexico, May 29, 1883, the following proceedings were had, to wit:

JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass. 1280.

It is ordered that time for defendant to file its bill of exceptions in the above-entitled cause be, and is hereby, enlarged and extended until the first day of July, A. D. 1883.

S. B. AXTELL,
Chief Justice, &c.

And afterwards, to wit, at another regular term of said district court, begun and held on the second Monday of July, 1883, and on the twenty-second day of said term, the same being Thursday, August 2, 1883, the following, among other, proceedings were had, to wit:

JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass. 1280.

12 It is ordered that the time for filing bills of exceptions in the above-entitled cause be, and hereby is, enlarged and extended for thirty days from this date.

S. B. AXTELL,
Chief Justice, &c.

And afterwards, to wit, on the first day of September, 1883, the said defendant, by its attorneys, filed in the clerk's office aforesaid its bills of exceptions; which said bills of exceptions are in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, *County of Santa Fé:*

First Judicial District Court. February Term, A. D. 1883.

JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass.

Be it remembered that in the above-entitled cause, after appearance, and upon being required to plead to the declaration herein, the said defendant, by its attorneys, interposed a demurrer to the said declaration as follows, to wit:

TERRITORY OF NEW MEXICO, *County of Santa Fé:*

First Judicial District Court. July Term, A. D. 1882.

13 JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass.

And the said defendant, by its attorneys, comes and defends the force and injury when, &c., and says that the said declaration and the matters therein contained, and each of the counts thereof severally, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that it, the said defendant, is not bound by law to answer the same or either of the several counts thereof, and for causes of demurrer the said defendant states and shows to the court here the following—that is to say:

The form of action is improper and should be case.

The said declaration charges that the defendant assaulted, beat, shot, and wounded the plaintiff, the acts charged being such that the corporation could not commit. If plaintiff has a cause of action, he should declare specially in case.

The declaration shows that said assault, wounding, and shooting of the plaintiff was committed by agents and servants of the
14 defendant; that it was not done by them in the course of their employment or for the benefit of the defendant.

The declaration does not show that the defendant owed any duty to the plaintiff, or that any relation or connection existed between them. It shows and alleges that plaintiff was the employé of another company, and does not show any undertaking or duty as to him by the defendant.

The acts charged appear from said declaration the unlawful and wilful acts of the person who committed the same, and that they were not in the course of their duty to the employment of the defendant.

The declaration shows that the acts complained of are of such a character as the defendant could not do, except through its agents and servants, and it could not authorize to be done by them. The declaration does not charge or show any neglect, want of skill or

care on the part of the defendant's servants, or the unskilful or improper doing of any act which the defendant could lawfully do or direct, or cause to be done; the acts charged were the wilful and wrongful acts of the person who did the same and which the defendant could not have authorized to be done in any way.

And the said declaration seeks to charge the defendant with
15 the criminal acts of its servants committed against a stranger wilfully and not in the course of their employment. The acts complained of in said declaration, as therein stated, could not be charged to the defendant, even if expressly commanded and directed by its officers or its board of directors.

And said declaration is in other respects insufficient. If any right of action is shown it is in case, not trespass.

And this the said defendant is ready to verify. Wherefore, by reason of the insuffi-ency of the said declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action against it.

T. F. CONWAY AND
BREEDEN AND WALDO,
Att'ys for Def't.

Which demurrer, being heard, was overruled by the court in the words and figures following, to wit:

JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass. 1280.

Now comes the said plaintiff, by his attorney, J. H. Knaebel, Esquire, and defendant comes, by his attorney, William Breeden, Esquire, and this cause coming on to be heard upon the de-
16 murrer of the said defendant, said demurrer is argued by counsel, as well for said plaintiff as for said defendant, and submitted to the court; and the court, being sufficiently advised in the premises, overrules said demurrer. It is therefore considered by the court that the said declaration and the matters therein contained in manner and form as the same are above pleaded and set forth are sufficient in law for said plaintiff to have and maintain his said action against said defendant, and that said defendant is in law bound to answer the same, and it is ordered by the court that said defendant be, and it hereby is, given leave to plead over to said declaration on or before Tuesday, the sixth day of February, 1883.

To the ruling and decision of the court in overruling said demurrer the defendant, by its attorneys, then and there excepted, and now prays that this its bill of exceptions be signed, sealed, and made a part of the record in said cause, which is accordingly done.

September 1, 1883.

S. B. AXTELL, *Judge.* [SEAL.]

TERRITORY OF NEW MEXICO:

First Judicial District Court, County of Santa Fé. February Term, A. D. 1883.

17 JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass.

Be it remembered that on the trial of the above-entitled cause the plaintiff introduced as a witness WALTER V. HAYT, who testified as follows:

In June, 1879, I resided at Alamosa, Colorado, and was employed as mail agent in the postal department, and passed over the road once in three days. Late in the winter of 1878 the A., T. & S. F. came into peaceable possession of the D. &. R. G. railroad. One of their first acts was to make almost an entire change of their employés; there was hard feelings created at once on the part of the recent employés of the D. & R. G. The thing came to a focus early in June, 1879. The A., T. & S. F. at that time were in control of the road and running it. I was not an employé of the road at that time, but in the mail service. I ran into Alamosa on the night of June 11th. During the night *the night* of June 11th the train which I came in on was run out of town. During that night or early in the morning a train consisting of a lot of cattle cars drawn by the old switch engine at El Moro came into Alamosa. I was awakened on the morning of the 12th by ex-Governor Hunt, vice-president and assistant manager of the former D. & R. G. I knew him very well indeed. I replied to ex-Governor Hunt, asking, in fact,
18 if the mail train was there. He said it was not. I asked him what protection I was to have for the mail. He said he would protect it on condition I would run it out. I told Governor Hunt I would go if he would keep me safe. The train left Alamosa at nine o'clock in the morning. It consisted of cattle cars, drawn by the old engine from El Moro, with about two hundred armed men aborard; they were under the instructions of Gov. Hunt and armed with Winchester and six-shooters. The train proceeded to Fort Garland, where the first stop was made. I received the mail from the postmaster at Fort Garland and gave him his pouch. The train then proceeded to Placer, where a stop was made of some time, all hands took a drink and received re-enforcements. We then went over La Veta Pass, which was very slow work on account of the train being so long. About one o'clock we arrived on the other side of the hill at La Veta; here we were given dinner; we also received re-enforcements there; proceeded from there to Cucharas. At Cucharas quite a halt was made. After considerable deliberation it was decided to move on to Pueblo, where we arrived about six o'clock. I think there must have been a crowd of about two thousand—a mob—at the railroad depot; considerable demonstrations were made. I took my register pouches and went over to the postmaster, who refused to receipt, giving as a

19 reason that the town was in the hands of a mob. Between five and six the train *the train* arrived from Denver having a mail car on but no agent. I unlocked the car and took possession; stopped at Pueblo all night. Next morning it was attached to some other train containing the armed men and taken to Canon City, and late that afternoon was run into Denver; the train was supposed to be run by the D. & R. G. railroad. Gov. Hunt was on the train on its journey from Alamosa to Denver. At every town we passed through the train was cheered, anvils were fired, and it seemed almost like a holiday—like a Fourth of July celebration.

The occasion of the armed men being on the cars and said demonstrations was to take possession of the railroad for D. & R. G. from the A., T. & S. Fé, who were in peaceable possession. Gov. Hunt and Col. Irvin were in charge of that train. Col. Irvin was division engineer of that road. When the D. & R. G. men took possession of the road they run off the employés of the A., T. & S. F. One instance was the agent at Alamosa, and the telegraph agent, who were taken that night out of their room at the depot by force. They were forced aboard of the coach and taken to Lake City. The agent at Pueblo was run out of his office by an armed mob. I don't know who they were. They *they* were under the control of
20 Gov. Hunt, Col. Irvin, and Mike Green. They paid their men for doing this—for making this war. This D. & R. G. or their agents paid those men five dollars a day as wages and furnished them with arms. The difficulty between the two roads continued for a period of fifteen or twenty days—commenced about the 11th or 12th. I can't swear to the dates. The time I pulled out from Alamosa—the night the engine was taken out—was the first demonstration I had seen. This state of affairs continued until the D. & R. G. got possession of the road. They had a big demonstration on the fourth of July, and I think that was the night on which the receiver was appointed—continued from they 12th of June up to the fourth of July. The train on which I left Alamosa had a United States flag on it.

Cross-examination:

Q. Do you know who were the directors of the D. & R. G. at the time?

Ans. I don't know as I can name them all. I had never been present at any of their meetings. I was not present at any meeting of said directors when they authorized any of the proceedings I have testified about, and I do not know that said board of directors ever authorized any of said proceedings. I know that one of the directors, Gov. Hunt, vice-president and assistant general man-
21 ager, was on the train while this violence was going on.

Q. How do you know he was a director?

Ans. From his own statements, by seeing his name used in that connection, by seeing it printed, by receiving passes from him and receiving money from him.

Q. By his own showing all the way through?

Ans. Yes, sir.

Continuing, witness said: I had received no pass from him since July, 1878; he was general manager when the D. & R. G. turned the road over to the A., T. & S. F., about the first of January, 1879. The disturbances I have testified about occur-ed in June, 1879. From January to June, 1879, the defendant, the D. & R. G. Company, was not operating that line of road at all.

C. F. MEYER was introduced and sworn as a witness for the plaintiff, and testified as follows:

I lived in June, 1879, in San Luis, Costilla county, Colorado, and was clerk of the county and of the district court for the county. Mr. Bowen was judge. In the first week of June, 1879, we had a term of the district court. During the term some attorneys of the D. & R. G. came down. About the 10th or 11th day of June I was in Fort Garland. I saw about five or six armed men stop at the sutler's store. A man by the name of Anderson was in charge
22 of the party. I knew Mr. Anderson very well, and I inquired of him where he was going and what he was going to do. He told me he was going across the mountains to Cucharas, and that he was employed by the D. & R. G. road. On the 12th day of June, I think it was, I was at Fort Garland again, and at about from 10 to 11 o'clock in the morning I saw a train come up from Alamosa. There was one engine and, I believe, two cars. I was off about two or three hundred yards, but I could see that the cars were full of armed men. This was about the 20th of June. They had armed men on; each train carried about twenty or thirty armed men. On the road I saw a good many cars that had been forfeited. Some of them had Government flags on, and I saw several of them that had holes in them where bullets had gone through. On the 20th of June the D. & R. G. had possession of the entire road from Alamosa to Denver. The Denver and Rio Grande officials tried to put me in jail in Pueblo, because they did not want to let me *to* go to Denver as a witness.

Cross-examination:

I was over the whole line, more or less, on the 20th day of June, and I undertake to swear positively that on that particular
23 day the D. & R. G. had possession of that line. The knowledge on which I testify is I knew that after they took the road on the 10th or 12th until the case came up in Denver United States court and the judge set a certain day that the road should be turned back to the A., T. & S. F. On the 20th of June I was in Costilla county, I went up to Denver about that time. I was either in Costilla, Denver, or on the road to Denver. I don't think I was in all those places during that day.

Q. How can you swear as to who had possession of that road in Denver that day and at the same time swear as to who in Alamosa?

[A.] I kept pretty well informed as to what they were doing.

And continuing, witness said: I only know they were in possession the day I went up to Denver. I know they had possession of the entire line the day I went to Denver. I cannot swear exactly, but more

or less. I left the 20th. The train left Fort Garland about eight o'clock in the morning, and I got into Denver about nine or ten o'clock at night. I cannot swear who had possession of that road at Denver when I left Alamosa. I knew who had possession on that day, because I spoke to a great many officials that had been working for the A., T. & S. F., and they told me what had occurred at pretty near every station on the road. I was never present at any meeting of the directors of the D. & R. G.

24 Q. Do you know, then, of your own knowledge, of that company having taken possession of the road?

Ans. Yes, sir.

Q. How do you know?

Ans. About the 4th or 5th day of June a man by the name of Charlie Carrol came to me from San Luis, and I knew by what he told me and some more.

Continuing, witness said: I was in Col. Hunt's room, and know from what he told me; that's all I do know. I know Hunt had to do with that road because he told me so. I knew from what he told me; I knew it in no other way; I only knew it from what I heard and from what Hunt told me.

JAMES HARRIS was sworn for the plaintiff, and testified as follows:

I am the plaintiff in this cause. On the 10th of June, 1879, I was in different places in different counties and different States. I was employed by the A., T. & S. F. at El Moro, Cucharas, and Fort Garland, Colorado, as watchman of the A., T. & S. F. Railroad from the sixth of April of the same year. I received an injury about that time. I was called on—I and a party of 12 men—was called on from El Moro to meet the officials of the Santa Fé at Cucharas, Colorado, to escort them from there over the moun-

25 tain to Fort Garland. They were going over to attend court. We waited at Fort Garland until the return of the officer from San Luis, when we came back to Cucharas; they left us there and took the train on to Denver; that was about the eight- of June. The next morning I was sent to El Moro to get some Winchester rifles from the agent there to arm us, along with the pistols we had, for our party at Cucharas. They expected trouble between the A., T. & S. F. and the D. & R. G. On the evening of the 10th or 11-, about 11 o'clock in the night, I he-rd a train or an engine coming. I woke the man who was in charge of our party and told him there was a train coming. He asked me in what direction it was coming, and I told him El Moro. He got up and took his lantern in one hand and his rifle in the other and told me to stick a red light in front of the depot. He started on down the track and in about ten or fifteen minutes I saw him climbing up from the track on the coal shaft, and just as he got up there some one hollered, "Throw up your hands, you son *son* of a bitch," and I told the boys who were with me—I says, Get yourselves ready, fellows; and I started to put the lantern in front of the depot. Just as I did so they commenced firing at me. I could not tell who they were; came from the

26 direction of this train—from the direction this engine was

coming. When I got to the door they quit firing; everything was quiet. I told the boys to come and help me fix some small sticks out of the door and make a breastworks outside of the depot. Just about the time we had the sticks in position I saw some one slipping up the track; I could not tell who they were, as it was dark, and I says, "Who comes there?" In place of answering they commenced to fire upon us, and I gave the order to the other boys to return the fire. We kept up the firing for ten or fifteen minutes. A man hollered, "Come away from there and stop that firing." Some feller said, Who is it giving that order? says "Who is it give that order?" says, "It's Mik- Green, and come on here quick." The men then quit firing and followed him.

Q. Did you hear Mike Green?

Ans. I heard a man who said he was Mike Green; I know his voice, and recognized that voice as Mike Green's; he was road-master of the D. & R. G.

Witness continuing, said: The crowd withdrew and turned around *around* on the Y laying off to Alamosa. We did not know what they were doing until the engine blew her whistle; she started down on the dead jump in *in* the other direction over toward Alamosa. I said, "Boys, they have gone for reinforcements, and it won't do for us to take any chances and stay here until they come back." We put on two hand-cars; it
27 was about one o'clock at night, and started towards Pueblo; we had gone about a mile and a-half—to the first cut north of Cucharas. Just after running through this cut we run onto a body of men who were scattered across it; there was a big rise on the other side and we were putting on extra force to climb this grade, traveling about nine or ten miles an hour; when we struck this force there were five of us on the first car and six on the rear car; I was standing on the right-hand side of the car, between the two levers, passing this party. Just as we came up to them they turned loose on us a volley of shots, could not tell how many, and I was hit by that volley, and a man who was standing in front of me, and I fell off to the right. It was down a big dump; I suppose 75 or 80 feet, and I found myself at the bottom, with my right leg turned backwards, my right foot on my right shoulder, laying on my left side. I was hit by bullets; I was hurt in the right side, and just then I saw an engine between me and Pueblo—right north of me. I said to the rest of our boys: "You had better quit firing, boys; there's a train coming in front, and I guess they've got more men." The ball went in here and came out here (showing the jury about the hip). I lay there about half an hour. The engine I saw
28 come moving up towards us, and I thought I knew the crowd that was on the train and hollered, saying: "Is Ben. Smith on that train." "No; Ben. Smith is not here, but Capt. Anderson is." Capt. Anderson was one of the directors of the road, as I thought; he done the employment. He had charge of the D. & R. G. forces, who shot me. Capt. Anderson came up to me and says, "Jesus Christ, is this Jim!" I says, "Yes, it is." He says, "I would not care if it was any one else but you." He called some of his men over

and carried me and put me on the train and then came back and got the other men; then we started for Huerfano; when we got there they carried me into the hotel and I sent for a doctor. The doctor came and examined me, and put my leg into position, and then the sheriff came into the room and took the men who brought me there—I mean the rest of the party—and locked them up in jail and left me and the other wounded man. Capt. Anderson came to see me afterwards. The next morning a train came down from towards Alamosa; it was loaded with men on top armed, with the United States flag up on the middle of the train and a lot of mail sacks scattered around it. The train stop-ed there and Gov. Hunt came over to the hotel where I was. The proprietor says to
29 him, "Here are some of the men who were wounded last night in the fight." He says, "Were they hurt very bad?" The proprietor says, "There was one dying." He says, "Which side was he on?" "On the Denver and Rio Grande forces, but these other two boys were Atchison, Topeka and Santa Fé." "He says, "I don't care about them. I don't want to see them." I said "You old son of a bi-ch, there is nobody wants to see you either." I was there twenty-one days. The first eight days I had no pain, everything was dead, but from that time on I did not know whether I was alive or dead; the doctor laid right on the bed with me all night long and made me two or three visits a day. I guess I wore my teeth off plum- to the gums, and my fingers, I expect the marks of them are on the bed posts to this day. I was on crutches up to the first of November, 1879, but I could not get along without a cane until somewhere in the neighborhood of June, 1881. It was all of two years before I was able to work. I am a man who works for a living. My health was very good previous to receiving that wound. I had just completed about ten years service for the United States Government. Since then my leg has pained me at times; a kind of rheumatic pain catches me in the hip at times; it deprives me of work; sometimes a day
30 at a time, sometimes more. It has shortened my leg. I wear one heel longer than the other. It effected my private parts; after the wound my testicles swelled up about as big as a common-sized water bucket—right at the time—and my penis wasted away. I am not able to emit. My condition previous to that time was generally pretty good, natural or normal condition. I got acquainted with Cap. Anderson just after I went into the employ of the Santa Fé Company. He had charge of some coal mines and some men at El Moro, and he came to me one day at El Moro, and says, "You'd better quit the damned outfit and work for us; we pay better wages." I would not hire to him. On about the 25th of May he came to me in the evening as I was putting the guards on for the night at the round-house at El Mora; it was part of my work to place guards upon it at night; it was the round-house of the Denver & Rio Grande, but was the property of the Santa Fé; there were two engines in it, and several other articles. I was just going to put the guards on when I saw Cap. Anderson as I passed by going from the depot to the round-house. He said: "Jim, I want to see you

when you come back." "Very well; I will see you in a few minutes."

31 By the COURT:

Q. What did you say about Cap. Anderson?

Ans. That he was in charge of some coal mines of the Denver and Rio Grande at El Moro.

Witness continuing, said:

When I came back from putting on my guards I came back and said, "Mr. Anderson, here I am." He said, "Let's go up to Rufe's saloon." We went up to the saloon and we had several drinks together. He said, "Look here, Jim, you are a poor man, working for a living." I said, "Yes, sir." He said, "This railroad war does not matter to you; let me pick out two of your own men to-night to put on guard at that round-house in place of the men you have put there, and I will give you eighteen hundred dollars. I says, "No, sir; if you give me eighteen thousand dollars you can't get no men here."

Cross-examination:

I don't know the name of the man who shot me. I know who he was. It was in the night. A number of people fired. I know which one shot me; he was the only man who stood in the middle of the track in front of me; there were thirty or forty men with him; they appeared to all fire; some had Winchesters, some had breech-loading muskets—Springfields I believe. I can't say how many had
Winchesters. I saw three or four, I think. I know that more
32 than one had them. I can't say how many had the army muskets. I can't say how many fired; I know that more than one fired. I don't know that as many as five fired. I did not say how many shots were fired out of Winchesters. To the best of my recollection, I thought I saw from four or five army muskets and three or four with Winchesters; that was all I could see; there were other men there, but I could not see what class of arms they had. I said there were thirty or forty men there, but I do not know how many fired. There was only one had the army musket that I am positive of—the man that shot me. I don't know his name. I never saw him before. He was a Mexican—an ordinary-sized Mexican man—about the usual size of a Mexican; a pretty spare man; he was not quite as tall as you (Breeden, about 6 feet). It was about two o'clock on the morning of June 11th, 1879; the moon was just coming over the eastern horison; it was not light enough to see plainly all the people there or tell whether they were Mexicans or Americans. I cannot say how many of them were Mexicans. He was not nearer to me than any of the others. I cannot be certain, but I think they were nearly all Mexicans. At the first volley all who fired fired at the same time. There were ten men with me—
all behind me; I was in advance of the party. I can't say
33 how many fired. I swear that more than one fired; from the darkness and the sounds of the shots I should say that at

least half of them fired—somewhere near 15 or 20; it had been a pretty dark night; when they fired it was getting to be pretty light. I could not see the whole 30 or 40. I will not swear there were 30 or 40. I will swear that there were 20. I was shot in the hip; the ball passed through. I never found the ball and do not know its size. I know the kind of a gun I was shot with from the man who shot me. I was on a hand-car when shot, going to Pueblo, at about ten miles an hour. I was not working the car, but standing between the levers; the people who fired were standing one on the track and on both sides of the track on the ground. I cannot state the distance they were from me. They did not call on us to stop; the first warning I heard was a shot. They appeared to have been lying down and just rose up and fired. I was shot by the first volley; quite a number fired. I am not certain who those people were, except one; I can swear to the identical man who shot me. Thirty or forty fired at me, and yet I swear that I identified in the night the particular man who shot me; he was standing on the track, right in front of me; it was quite a large dump,
34 and the others were on both sides of it. I said, "Suppose they had been lying down." I thought the man who shot me was lying down. They just raised up and fired; did not call on us or speak. I recognized the man who shot me next morning. I knew him that night; knew he was a Mexican, and of ordinary size. I saw him next morning, and that enables me to describe him. I recognized him next morning, and he told me, "I know you are the man I shot, but you are not the man who shot me, and I hope you will forgive me before I die." I had his face right in my mind, and I could have told him in a thousand. I don't know how I could pick out the man who shot me, but I did it, and the next morning I asked him if he were not the man who shot me, and he said he was; and said, "I hope you will forgive me before I die." The affair occurred in Huerfano county, to the best of my recollection. The party was in charge of Captain William Anderson. It was not under the charge of the sheriff of Huerfano county that I know of. I don't know whether the sheriff was there or not. I did not know the sheriff, and do not know that he was not there that night. I do not know that he was not in charge of the party, only Cap. Anderson required me to surrender my arms. All that I know is that I was going on that
35 railroad that night in a hand-car, and a party of 30 or 40 men raised up in front, and that I was injured; that is all I know. And I knew that they had parties along there every day, and they had the section-house there filled with arms to use on me.

Q. Who do you mean by they?

Ans. I mean to say Cap. Anderson and some of the working force, men who was working every day on the section on that road in the employe of the Santa Fé Company, but with the feelings against them; turned traitors on us and fired on us at night.

Q. Employés of the Atchison, Topeka and Santa Fé Railroad Company?

Ans. Yes, sir; under pay of Cap. Anderson, of the Denver and Rio Grande, and got paid eight dollars per day.

Witness continuing, said:

My health in some cases is very good. I never felt better in my life, but when it comes down to my private parts I don't think I am a man at all, and never will be. I am thirty-six years of age. From the time I was shot to October 1st, 1879, I was paid by the Santa Fé Company at the same rate at which I was employed; from that time until February following I was paid by the company at a smaller rate, and from then until June, 1881, I had to make my own
36 living, which I did by hobbling around and emptying slops in the saloons. I am now a miner. I commenced mining about the 1st of September, 1882, two years and seven or eight months after I was hurt. Before that I carried water, and was a general roustabout for saloons. When I was just coming out of the army —; had been working for a time for the Sisters of Charity in Santa Fé; had been in the saloon business a little before I was shot.

This was all the evidence introduced or offered in said cause, and all the evidence before the court and jury in said cause, and in order to preserve the same, the defendant, by its attorney-, prays that this its bill of exceptions containing the evidence, and to preserve and bring the same into the record, be signed, sealed, and made a part of the record in said cause, which is done accordingly.

September 1st, 1883.

S. B. AXTELL, *Judge.* [SEAL.]

And be it further remembered that on the trial of said cause the defendant, by its attorney-, objected to each and every question put to the witness-, Walter V. Hayt and C. F. Mayer, separately and particularly, and to the answers to said questions and each of them, and to the entire evidence of said witnesses, as irrelevant,
37 immaterial, and not connected with the matter in issue or with the supposed cause of action of said plaintiff, and also to all that portion of the evidence of the witness (plaintiff), James Harris, which relates to events and occurrences prior to the occasion, time, and place at which he was injured as testified by him, and to each question put to and answer made by him touching such events and occurrences; which objections were severally overruled by the court, and said questions, answers, and evidence admitted; to which ruling of the court in each instance the defendant, by its attorney-, did then and there except, and now prays that this its bill of exceptions be signed, sealed, and made a part of the record in said cause, which is accordingly done.

September 1st, 1883.

S. B. AXTELL, *Judge.* [SEAL.]

And be it further remembered that after the evidence in said cause was closed, the defendant, by its attorney-, moved the court to instruct the jury as follows, to wit:

HARRIS *vs.* DENVER AND RIO GRANDE RAILWAY COMPANY.

38 The court instructs you as matter of law that under the evidence in the case it appears that the injury of which the plaintiff complains, if it was committed by the agent or agents of the defendant, was a wilful tort on the part of said agent or agents, for which this defendant cannot be held liable, you should find for the defendant. Refused.

The court instructs you that — the tort of which plaintiff complains was such a tort as that neither the assistant general manager or vice-president or any other officer of the defendant company could authorize to be committed or ratify after being committed, so as to bind this defendant, you should then find for the defendant. Refused.

In this cause there is no evidence that the man who did the firing which injured the plaintiff *were* in any manner in the employ of the defendant or for any purpose. That being the case, the jury should find for the defendant. Refused.

Agents or managers of the affairs of a railroad corporation such as the defendant cannot be legally employed by such company to shoot a person, nor are the officers, agents, or manager of such company, in the usual course of their employment as such offi-
39 cers, agents, or manager, authorized to employ any one to shoot another person. Given.

The court instructs the jury that although they may believe from the evidence that the plaintiff was shot by men in the employ of the defendant, and that shooting was done or ordered by an agent of the company, yet that such shooting and such order was beyond the power of such employé or agent, as such employé or agent, and that the company was not bound by such acts or orders. Refused.

An agent or a manager of a railroad company has no power or right, by virtue of his employment as such, to direct the employés of such company to shoot a man, and cannot bind such company so as to render it liable for any such order or act to any one who may be damaged thereby. Refused.

Before a railroad company can be held liable for the wilful act of any employé or agent in shooting a person or causing a person to be shot it must appear from the evidence, to the satisfaction of the jury, that such employé or agent had been employed by the company, under authority of its board of directors, to do such
40 acts or that [it] in some way ratified the said act and adopted it as its own act. [Lined out:] Failing such proofs in this case, the jury should find for the defendant. Given, except as to part lined out..

But the court denied said motion and refused to give said instructions, and thereupon instructed the jury, against the objection of the defendant, as follows, that is to say:

GENTLEMEN OF THE JURY: If you believe from the evidence that the Denver and Rio Grande railroad employed the men who fired pon and wounded the defendant, and instructed them to use vio-

lence against the employés of the Atchison, Topeka and Santa Fé road, and also find that the men so employed did shoot and wound this plaintiff in obedience to the orders and under the direction of the officers and agents of the Denver and Rio Grande R. R., they must find a verdict for plaintiff.

If you find for the plaintiff you will find such an amount of damages as you think just, not to exceed the sum of $10,000.00 In determining the amount of damages you are at liberty to consider *to consider* the anguish of the plaintiff, both in body and mind, both in the present, in the past, and in the future, so far as they are connected by the evidence with the wrongful acts of the defendant.

41 On the question of damages, if you believe from the evidence that the injuries were received by the plaintiff as he testifies, you are not limited to the consideration of *of* the pain and agony of mind and body incidental to the gun-shot wound, the bruises received in being thrown from the hand-car, the contortion of the leg and the suffering during sickness, but you must also consider all suffering and loss of time and business undergone by the plaintiff for the years following the occurrence, as well as all future damage and discomforts that, in your judgment, will probably follow in the future throughout the defendant's life.

The damages are wholly within your disc-etion, but since the plaintiff claims ten thousand dollars only, you cannot in any view award him a greater sum than ten thousand dollars.

In estimating the damages you may consider the effects that, in your judgment, will probably follow throughout the plaintiff's life as a result of the injury; and if you believe from the evidence that the plaintiff has been deprived of virility and rendered sexually impotent by reason of the defendant's wrong proved, you can award damages to compensate him for the deprivation which he may suffer in loss of any comforts of marriage and of the power to

42 have offspring; but the damages are in any case limited to $10,000.00 in the aggregate, all grounds of damage considered. You are not limited to mear-ly to compensatory damages, but if you find that the defendant acted with bad intent, and in pursuance of an unlawful purpose sought forcibly to take possession of the line of railway occupied by the Atchison, Topeka and Santa Fé Railroad Company, and in so doing shot the plaintiff and caused him incurable and permanent injury, you are permitted to find punative or exemplary damages over and above ordinary damages, always bearing in mind that the total verdict cannot exceed ten thousand dollars.

The corporation is liable, if you believe the testimony of the witnesses. A corporation can act through agents, and if the defendant used the force proved to to gain the property sought, it is liable in not exceeding $10,000. Refused.

To which ruling and decision of the court in refusing the instructions asked for by the defendant, and in giving the instructions which were given (objection being made to each separate instruction and each portion of such instructions), and to the action of the court in submitting said cause to the jury, the defendant, by its attor-

43 ney, did then and there except, and *and* now asks that this its bill of exceptions be signed, sealed, and made a part of the record, which is accordingly done.

September 1st, 1883.

S. B. AXTELL, *Judge.* [SEAL.]

And be it further rem-bered that after the jury which tried the above-entitled cause had returned a verdict thereon, and before judgment had been entered thereon, the said defendant, by its attorney, filed its motion for judgment *non obstante veredicto.*

TERRITORY OF NEW MEXICO:

First Judicial District Court, County of Santa Fé. February Term, 1883.

JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass.

And now, upon the presentation of the verdict of the jury herein, comes the said defendant and moves the court to enter judgment herein for the said defendant, notwithstanding the verdict herein, because there is no cause of action stated in the declaration herein and because the said declaration states and shows no state of facts which if admitted to be true, would give the plaintiff
44 any cause or right of action against the said defendant.

BREEDEN & WALDO,
Atty's for Def't.

Which motion was overruled and denied by the court in the words and figures following, to wit:

JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass. 1280.

Now comes the said defendant, by its attorney, Henry L. Waldo, Esquire, and moves the court for a judgment herein, *non obstante veredicto*, and the court being sufficiently advised in the premises, overrules the said motion; it is therefore ordered by the court that the said motion be, and the same hereby is, denied.

And thereupon the defendant, by its attorney, moved the court to set aside the verdict and grant it a new trial in said cause, which motion was as follows, to wit:

In the District Court, County of Santa Fé. Feb'y Term, 1883.

45 JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

Now comes the said defendant and moves the court to set aside the verdict in the above-entitled cause and grant a new trial, for the following reasons, to wit:

First. The verdict was contrary to the law and the evidence.

Second. The court erred in allowing improper evidence to go to the jury on behalf of the plaintiff.

Third. The court erred in not excluding improper evidence offered by the plaintiff from the jury.

Fourth. The court, on its own motion and at the request of the plaintiff, gave improper and wrong instructions to the jury.

Fifth. The instructions given by the court on its own motion and on the motion of the plaintiff misdirected and mislead the jury, or were calculated to do so.

Sixth. The court refused to give proper instructions to the jury that were asked for by the defendant.

Seventh. The court erred in permitting the plaintiff to introduce any evidence tending to show that any officer or employé or agent of the defendant company did, or caused to be done, or ap-
46 proved of the doing of any of the alleged acts complained of, without showing that the defendant company by the board of directors either directed the same or adopted or approved of the same afterwards.

Eighth. The court erred in allowing the plaintiff to prove that he was hurt by any one in the employ of the defendant company without first showing that the person so doing had authority from the defendant company to do such acts, or that the defendant company afterwards adopted the same as its own act.

Ninth. There is no evidence showing that the person who did the shooting was at the time in the employ of the defendant company.

Tenth. There is no evidence tending to prove that the defendant company either authorized the alleged shooting or adopted or approved of the same as its own act.

Eleventh. It appears by the evidence that the shooting in question was a wilful shooting, unauthorized or unadopted by the defendant company in such a manner as could or would bind said company.

Twelfth. The court admitted and allowed the jury to consider hearsay evidence and evidence of many facts not in any manner bearing in matter in issue, but having a tendency to mislead the jury.

47 Thirteenth. The said verdict should have been in favor of the defendant instead of in favor of the plaintiff.

BREEDEN & WALDO,
Defendant's Att'ys.

But the court also denied said last-named motion in the words and figures following, to wit:

JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY. } Trespass. 1280.

Now comes the said defendant, by it- attorney, Henry L. Waldo, Esquire, and moves the court to grant a new trial in this cause for reasons set fourth in said motion on file, and said motion being sub-

mitted to the court, without argument, and the court being sufficiently advised in the premises, denies said motion. It is therefore ordered by the court that said motion be and the same — hereby denied. And, thereupon the defendant, by its attorney, moved the court to arrest the judgment in said cause, and filed its motion as follows, to wit:

In the District Court, County of Santa Fé. February Term, 1883.

48 JAMES HARRIS
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

Now comes the said defendant, by its attorneys, and moves the court to arrest the judgment in the above-entitled cause for the reasons following, to wit: The evidence in said cause introduced on behalf of said plaintiff does not tend to prove the allegations of said declaration. Said declaration is insufficient in law so as to bind said defendant to answer the same or authorize any judgment to be entered against said defendant thereon.

BREEDEN & WALDO,
Att'ys for Def't.

Which motion for an arrest of judgment was also denied by the court.

To the ruling and decision of the court in overruling and denying each the motion for *non obstante veredicto* for a new trial and for an arrest of judgment, the defendant, by its attorney, did then and there except, and now ask, that this its bill of exceptions be signed, sealed, and made a part of the record in said cause, which is accordingly done.

September 1, 1883.

S. B. AXTELL, *Judge.* [SEAL.]

49 And be it further remembered that on the trial of said cause the defendant, by its attorney, objected to each question, answer, and statement as to what was said or stated by Gov. Hunt, Cap. Anderson, or any other person named by either of the witnesses, on the ground that such evidence was mere hearsay, and that the declarations of such persons could not effect the defendant, and that such evidence was misleading and improper, but such objections were in each instance overruled, and such questions, answers, and statements admitted; to which rulings the *the* defendant, by its attorney, then and there in each instance excepted; defendant also objected to the statements of witness Walter V. Hayt that Gov. Hunt was assistant manager and vice-president of the D. & R. G.; the statement that the postmaster at Pueblo refused to receipt for registered packages, and gave as a reason for such refusal that the town was in the hands of a mob; also the statement that the train referred to was supposed to be run by the D. & R. G. railroad; also statement as to the demonstration on the road; also statement as to the occasion of the doings referred to by witness; also the statement as to how the D. & R. G. men treated the em-

ployés of the A., T. & S. F., and as to what happened to the agent and telegraph agent at Alamosa, and the agent at Pueblo;
50 and the statement that the men were under control of Gov. Hunt, Col. Irwin, and Mike Green; and to the statement that Gov. Hunt was on the train. Defendant also objected to statement of witness Meyer, that Cap. Anderson told him that he was employed by the D. & R. G. road, and all statements of what Anderson said and the statement as to seeing armed men and fortified cars, and the statement that the D. & R. G. officials wanted to put witness in jail at Pueblo to prevent his going to Denver as a witness; defendant also objected to a statement of witness Harris as to what was said and done at Cucharas on the night of the 10th or 11th, as testified by him; also as to what was said by Cap. Anderson at the time witness was injured, and what Gov. Hunt said at Huerfano; also the statement as to what Cap. Anderson said to witness at El Moro, and *that* his proposing to pay witness to allow him to select guards for the round-house; each and all of which objections were overruled by the court, and all of said statements admitted as evidence; to each of which rulings of the court the defendant then and there excepted.

And the defendant now prays that this its bill of exceptions be signed, sealed, and made a part of the record in said cause, which is accordingly done.

September 1, 1883.

S. B. AXTELL. [SEAL.]

51 TERRITORY OF NEW MEXICO,
First Judicial District, County of Santa Fé:

I, C. M. Phillips, clerk of the district court within and for said district, county, and Territory, certify that the foregoing forty-five pages and five — contain a true transcript of the proceedings in said cause as the same are of record in my office.

Witness my hand and the seal of said court this 11th day of December, 1883.

[Seal First Judicial District Court, N. M.]

C. M. PHILLIPS, *Clerk.*

52 And afterwards, to wit, on the 7th day of January, 1884, there was filed in the clerk's office of said supreme court the said plaintiff in error's assignment of errors, which said assignment of errors is in the words and figures following, to wit:

Assignment of Errors.

Supreme Court, Territory of New Mexico. January Term, A. D. 1884.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, Plaintiff in Error,
vs.
JAMES HARRIS, Def't in Error.

Error to the first judicial district court.

And now comes the said plaintiff in error, by its attorney, and

for its assignment of errors herein states and shows the following, that is to say:

The court below erred in overruling the demurrer of the defendant (pl'ff in error) to the declaration herein, and also in admitting improper, illegal, and irrelevant evidence for the plaintiff
53 (def't in error) on the trial of the cause, and also in submitting the case to the jury, there being no evidence to warrant a verdict for plaintiff (def't in error); and also in refusing to give to the jury the instructions asked for defendant (pl'ff in error); and also in giving the istructions which the court did give to the jury; and also in not entering judgment for the defendant (plaintiff in error) *non obstante veredicto;* and also in denying the motion of defendant (plaintiff in error) for a new trial; and also in refusing to arrest the judgment upon the verdict in this case as moved for, and in divers other respects apparent upon the record.

WM. BREEDEN,
Att'y for Plaintiff in Error.

On which said assignment of error is the following en-
54 dorsement, to wit: The Denver and Rio Grande Railway Company, pl'ff in error, *vs.* James Harris, def't in error. Assignment of errors. Filed in my office this 7th day of Jan., 1884. C. M. Phillips, clerk.

And be it further remembered that on Monday, the seventh day of January, A. D. 1884, being the first day of the regular January, 1884, term of the supreme court of the Territory of New Mexico, the following, among other, proceedings were had, to wit:

Error to 1st Judicial District.

DENVER AND RIO GRANDE RAILWAY CO., Pl'ff in Error,
vs.
JAMES HARRIS, Def't in Error. } 166.

It is ordered by the court that this cause be, and the same hereby is, set down for hearing at the incoming of court on next Wednesday morning.

55 And be it further remembered that on Wednesday, January 9, 1884, being the second day of said term of said supreme court, the following, among other, proceedings were had, to wit:

Error to 1st Jud. Dist.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, Pl'ff in Error,
vs.
JAMES HARRIS, Def't in Er-or. } 166.

This cause coming on to be heard upon the record, assignment of errors, and briefs on file herein, is argued by William Breeden, Esquire, on behalf of said plaintiff in error, and John H. Knaebel,

Esquire, on behalf of said defendant in error, and is submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And be it further remembered that on Wednesday, January 30, 1884, being the seventeenth (17) day of said term of said supreme court, the following, among other, proceedings were had, to wit:

56 *Error to First Jud. Dist.*

THE DENVER AND RIO GRANDE RAILWAY COMPANY, Plaintiff in Error,
vs.
JAMES HARRIS, Defendant in Error. } 166.

This cause having been argued by counsel and submitted to and taken under advisement by the court on a former day of the present term, the court bring now sufficiently advised in the premises, announces its decision by Associate Justice Bristol, all the members of the court concurring, affirming the judgment of the court below, for reasons set forth in the opinion on file. It is therefore considered and adjudged by the court that the judgment heretofore entered in this cause in the first judicial district court at its regular February term, 1883, held in and for the county of Santa Fé, from which this cause came into this court, be, and the same hereby is, affirmed, and that in accordance therewith the said defendant in error, James Harris, recover of the said plaintiff in error, The Denver and Rio Grande Railway Company, the sum of nine thousand dollars, with interest thereon from the third day of March, 1883, at the rate of six per centum per annum, and his costs in said district court expended, taxed at twenty-seven dollars and fifty-five cents, and

57 that he have execution therefor, and that he also recover of said plaintiff in error his costs in this court expended, taxed at — dollars and — cents, and that he also have execution therefor; and it appearing to the court that D. C. Dodge and Lyman K. Bass are sureties upon the bond of said plaintiff in error, filed herein to obtain a stay of execution of said judgment of said district court, it is considered and adjudged by the court that said James Harris recover of said sureties, D. C. Dodge and Lyman K. Bass, the sum of nine thousand dollars, with interest thereon from said third day of March, 1883, at the rate of six per cent. per annum, and also his costs in this behalf expended, as well in the court below as in this court, and that he have execution therefor against said securities; and it is ordered by the court that the execution on this judgment be stayed for the period of sixty days.

And be it further remembered that on Saturday, the ninth day of February, A. D. 1884, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a writ of error in the above-entitled cause, the original of which is hereto attached, and is in the words and figures as follows, to wit.

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the Territory of New Mexico, Greeting:

Because that in the records and process and also in the rendering of judgment in the said supreme court of the Territory of New Mexico, before you, in a suit between The Denver and Rio Grande Railway Company, plaintiff in error, and James Harris, defendant in error, a manifest error has intervened, to the great damage of the said The Denver and Rio Grande Railway Company, as by its complaint appears, we, being willing that error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, the present seat of the National Government, on the second Monday in October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court
59 may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the ninth day of February, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] C. M. PHILLIPS,
Clerk Supreme Court, Territory of New Mexico.

TERRITORY OF NEW MEXICO, *ss:*

In the Supreme Court.

I, C. M. Phillips, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of a writ of error from the Supreme Court of the United States to the supreme court of the Territory of New Mexico in a cause wherein The Denver and Rio Grande Railway Company is plaintiff in error and James Harris is defendant in error, and that the said plaintiff in error did on this day lodge in my office this the said copy of said writ for the said James Harris, defendant in error, pursuant to the provisions of section 1007 of the Revised Statutes of the United States, it being the purpose of said plaintiff in error to have said writ of error operate as a supersedeas pursuant to law.

Witness my hand and the seal of said supreme court of the Territory of New Mexico this 9th day of February, A. D. 1884.

[SEAL.] C. M. PHILLIPS, *Clerk.*

60 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the Territory of New Mexico, Greeting:

Because that in the records and process and also in the rendition of judgment in the said supreme court of the Territory of New Mexico, before you, in a suit between The Denver and Rio Grande Railway Company, plaintiff in error, and James Harris, defendant in error, a manifest error has intervened, to the great damage of the said The Denver and Rio Grande Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, the present seat of the National Government, on the second Monday in October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further
61 to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the ninth day of February, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal Supreme Court, Territory of New Mexico.]

C. M. PHILLIPS,
Clerk Supreme Court, Territory of New Mexico.

62 [Endorsed:] Original. The Denver & Rio Grande Railway Company, plaintiff in error, *vs.* James Harris, defendant in error. Writ of error to supreme court of the Territory of New Mexico. Filed February 9th, 1884. C. M. Phillips, clerk supreme court, Territory of New Mexico.

63 And be it further remembered that on Tuesday, the nineteenth day of February, 1884, being the nineteenth day of the term aforesaid of said supreme court, the following, among other, proceedings were had, to wit:

THE DENVER AND RIO GRANDE RAILWAY COMPANY, Plaintiff in Error,
vs.
JAMES HARRIS, Defendant in Error.

In this cause the above-named plaintiff in error having sued out a writ of error from the Supreme Court of the United States to this court to review the judgment of this court lately and at the present term thereof rendered therein in favor of said defendant in error, and application having been duly made to this court therefor by said plaintiff in error, it is ordered that the penalty of the bonds in error in said cause so removed to the Supreme Court of the United States be, and the same is hereby, fixed at the sum of fifteen thousand dollars ($15,000.00).

It is further ordered that upon the execution and filing of said

bond within sixty days from the rendition of said judgment, with sureties to be approved by the honorable chief justice of this court or one of the associate judges thereof, in case of his
64 absence, and upon the plaintiff in error otherwise complying with the requirements of the statutes in such case made and provided relating to writs of error from said Supreme Court of the United States, then and thereupon all further proceedings upon the judgment of this court in the cause shall be stayed until the further order of the Supreme Court of the United States in that behalf.

It is further ordered that responsible sureties, not residents of the Territory of New Mexico, and acceptable to the judge approving said bond in error, shall be received and accepted.

Dated this 9th day of February, A. D. 1884.

S. B. AXTELL,
Chief Justice Supreme Court of the Territory of New Mexico.

And afterwards on, to wit, the 21st day of February, A. D. 1884, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a supersedeas bond in the above-entitled cause, which is in words and figures as follows, to wit:

Know all men by these presents that we, The Denver and Rio Grande Railway Company, a corporation duly organized and existing under the laws of Colorado and of the United
65 States of America, as principal, and Frederick Lovejoy, Job A. Cooper, George Fritch and W. J. Jenkins, as sureties, are held and firmly bound unto James Harris in the full and just sum of fifteen thousand dollars ($15,000.00), to be paid to the said James Harris, his certain attorney, executor, administrator, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with the corporate seal of the Denver and Rio Grande Railway Company, attested by Frederick Lovejoy, its president, and J. W. Gilluly, its secretary, and sealed also with the seals of the sureties herein, and dated this sixteenth day of February, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at a term of the supreme court of the Territory of New Mexico, in a suit depending in said court between The Denver and Rio Grande Railway Company, plaintiff in error, and James Harris, defendant in error, judgment was rendered against the said The Denver and Rio Grande Railway Company, and the said Denver and Rio Grande Railway Company having obtained its writ of error from the Supreme Court of the United States and filed
66 a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James Harris citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Denver and Rio Grande Railway Company shall prosecute its said writ of error to effect and answer all damages and costs, including just damages for delay, if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE DENVER AND RIO GRANDE
RAILWAY COMPANY,
By FREDERICK LOVEJOY,
Its President.

FREDERICK LOVEJOY. [SEAL.]
JOB A. COOPER. [SEAL.]
GEO. FRITCH. [SEAL.]
W. J. JENKINS. [SEAL.]

[CORPORATE SEAL.]

Attest:

J. W. GILLULY, *Ass't Sec'y.*

Sealed and delivered in presence of—

—— ——.

The above bond in error, and the same to operate as a supersedeas, is this day approved by me.

67 Dated February 21st, 1884.

S. B. AXTELL,
Chief Justice Supreme Court of the Territory of New Mexico.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

We, Frederick Lovejoy, George Fritch, and W. J. Jenkins, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of thirty thousand dollars over and above all his just debts and liabilities.

FREDERICK LOVEJOY.
GEO. FRITCH.
W. J. JENKINS.

Subscribed and sworn to before me this 16th day of Feb'y, A. D. 1884.

[SEAL.] EDWARD F. BISHOP,
Clerk Dist. Court U. S.

DISTRICT OF COLORADO, *ss:*

The within-named sureties are by me known to be each ample for the sum in the bond mentioned, to wit, $15,000.00.

Denver, Col., Feb'y 16, 1884.

Teste: EDWARD F. BISHOP,
Clerk Dist. Court U. S.

68 (Endorsed:) The Denver & Rio Grande Railway Company, pl'ff in error, *vs.* James Harris, def't in error. Bond to def't in error. Filed February 21st, 1884. C. M. Phillips, clerk supreme court, Territory of New Mexico.

And afterwards on, to wit, the 21st day of February, A. D. 1884, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a citation in the above-entitled cause, the original of which, with the endorsements thereon, is hereto attached and is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA, *ss:*

To James Harris, Greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States to be holden at Washington on the second Monday of October next pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein The Denver and Rio Grande Railway Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned
69 should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable S. B. Axtell, chief justice of the supreme court of the Territory of New Mexico, this twenty-first day of February, in the year of our Lord one thousand eight hundred and eighty-four.

S. B. AXTELL,
Chief Justice Supreme Court, Territory of New Mexico.

SANTA FÉ, NEW MEXICO, *February* 21, 1884.

We, Gildersleeve & Knaebel, attorneys of record for James Harris, defendant in error in [the] above cause, do hereby accept service of the above and foregoing citation in behalf of said James Harris, defendant in error, on the date above written.

GILDERSLEEVE & KNAEBEL,
Attorneys for Defendant in Error.

(Endorsed:) The Denver & Rio Grande Railway Company, plaintiff in error, *vs.* James Harris, defendant in error. Citation. Filed February 21st, 1884. C. M. Phillips, clerk supreme court, Territory of New Mexico.

And afterwards on, to wit, the 21st day of February, A. D. 1884, there was filed in the office of the clerk of the supreme court
70 of the Territory of New Mexico an affidavit of valuation in the above-entitled cause, which is in words and figures as follows, to wit:

STATE AND DISTRICT OF COLORADO, *ss:*

Personally came before me, clerk of the district court of the United States for the district of Colorado, Frederick Lovejoy, presi-

dent of the Denver and Rio Grande Railway Company, who, being duly sworn, deposes and says that he is such president; that the said The Denver and Rio Grande Railway Company was plaintiff in error in a case lately depending in the supreme court of the Territory of New Mexico, entitled the Denver and Rio Grande Railway Company, plaintiff in error, *vs.* James Harris, defendant in error, and that on the final hearing of said cause judgment was rendered against said plaintiff in error, and that the said The Denver and Rio Grande Railway Company, being dissatisfied with said judgment, has obtained from the Supreme Court of the United States a writ of error to remove said cause to the said last above mentioned court; this deponent further says that the amount in controversy in said cause exceeds the sum of five thousand dollars, exclusive of costs.

FREDERICK LOVEJOY.

71 Subscribed and sworn to before me this 15th day of February, A. D. 1884, at the district and State first above written.

[SEAL.] EDWARD F. BISHOP,
Clerk Dist. Court U. S., District of Colorado.

(Endorsed:) The Denver and Rio Grande Railway Company *vs.* James Harris. Affidavit of Frederick Lovejoy, president. Filed February 21st, 1884. C. M. Phillips, clerk supreme court, Territory of New Mexico.

72 THE UNITED STATES OF AMERICA, *ss:*

To James Harris, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein The Denver and Rio Grande Railway Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable S. B. Axtell, chief justice of the supreme court of the Territory of New Mexico, this twenty-first day of February, in the year of our Lord one thousand eight hundred and eighty-four.

S. B. AXTELL,
Chief Justice Supreme Court Territory of New Mexico.

SANTA FÉ, NEW MEXICO, *February* 21, 1884.

We, Gildersleeve & Knaebel, attorneys of record for James Harris, defendant in error in above cause, do hereby accept service of the above and foregoing citation in behalf of said James Harris, defendant in error, on the date above written.

GILDERSLEEVE & KNAEBEL,
Attorneys for Defendant in Error.

73 [Endorsed:] The Denver & Rio Grande Railway Company, plaintiff in error, *vs.* James Harris, defendant in error. Citation. Filed February 21st, 1884. C. M. Phillips, clerk supreme court, Territory of New Mexico.

74 And heretofore on, to wit, the 30th day of January, 1884, the same being one of the regular juridical days of the January term, A. D. 1884, of the supreme court of the Territory of New Mexico, there was filed in the office of the clerk of said court the opinion of the judges of said court in said cause, a copy of which is hereunto annexed, in accordance with the amendment to rule 8th of the Supreme Court of the United States, to be herewith transmitted, which is in words and figures as follows, to wit:

75 Supreme Court. Jan. Term, 1884.

DENVER AND RIO GRANDE RAILWAY COMPANY, Pl'ff in Error,

vs.

JAMES HARRIS, Def't in Error.

This case is here on writ of error to the district court for the first judicial district and county of Santa Fé.

Harris, the plaintiff below, brought an action of trespass against the Denver and Rio Grande Railway Co., a corporation under the laws of the State of Colorado, to recover damages in the sum of $10,000.00 for bodily injuries inflicted by the agents and employés of the defendant corporation while in and about the employment of their principal, and recovered judgment in the sum of $9.000.

As to the merits of the case, the whole controversy turns upon the question whether the injuries were inflicted by the agents or employees of the defendant corporation or other persons acting on their own behalf exclusively, or acting within the scope of their employment by such corporation.

A corporation being an artificial body created by law, all its acts necessarily must be performed by its agents and servants;
76 and when a corporation is sued in an action founded on the unlawful or tortious acts of the agents or servants, the fact whether the acts complained of were done on their own account exclusively, or on behalf of the corporation, within the line of their employment, is not ordinarily to be established by the plaintiff by proof of what occurred in some meeting of the directors of the corporation—the evidence of which is under the control of such directors—but by proof of what the agents and servants of the corporation had done, and of the attending circumstances indicating the purpose of their acts and the object to be attained thereby; and especially if attained, and the corporation accepted the same and used the fruits thereof as its own, proof thereof might be received to establish the corporate liability.

The old common-law doctrine, "a corporation cannot be aiding to a trespass" nor "give a warrant to do a trespass without writing," or that "it could authorize no agent to do an act and give no assent

but by deed," was long since exploded. The doctrin-, as now understood and applied by the courts, is that corporations are liable for every wrong, every trespass, and every tort committed by their agents and employees, within the scope of their employment as such,
and to the same extent as individuals under like circumstances,
77 and the doctrin- of *ultra vires*, as formerly understood and applied, does not, under the modern decisions, have any application to such cases. Mechanics' Bank *vs.* State Bank, 10 Wall., 645; National Bank *vs.* Graham, 10 Otto, 702; The State *vs.* The Morris & Essex R. R. Co., 23 N. J. L., 368, 369. The doctrine of *ultra vires*, as formerly understood and applied by the courts to corporations, was that such institutions were endowed with a species of infallibility; that they in their corporate character could not do or sanction any act by and through their agents or servants which they were not authorized to do by their respective charters conferring corporate powers; that because they were not authorized to do wrongful and tortious acts, they could, therefore, do no wrong.

But it was soon ascertained that these institutions, notwithstanding they had no legal authority to do wrong, yet often assumed powers *ultra vires* to do, and actually did commit all sorts of trespasses and unlawful and wrongful acts through wholly irresponsible servants and employees, often causing the greatest losses and damages to private individuals and their property; and the courts, to protect society, were finally impelled *ex necessitate* to place the responsibility of corporations on a more enlightened and reasonable basis.

The doctrine of *ultra vires*, as now interpreted by the courts
78 and applied to corporations, signifies merely such acts and doings of any corporation which, though it may have the power to perform, or to adapt and sanction through its agents or servants, yet it has no legal authority to do under its charter of corporate powers; in the same sense precisely that every act performed by a natural person, which the law, either in express terms or by necessary implication, does not sanction nor confer on him any right to do, would be illegal and might be termed *ultra vires*. In a well-considered case of The State *vs.* The Morris & Essex Railroad Co., *supra*, in which this whole subject is ably reviewed, and the modern doctrin- clearly expressed, the court, by its chief justice, used the following language: "But it is said that although a corporation may omit to perform acts made obligatory upon it by law and thus be liable for non-feasance, yet from its very nature it cannot use force, and, therefore, cannot commit any act involving force, and which must be charged to have been committed *vi et armis*. This argument rests entirely upon the disability of the corporation to commit any act of trespass or positive wrong, and applies to its capacity to commit civil as well as criminal injuries. It is this very argument by which it was sought to be established that no action for
a trespass or tort would lie against a corporation. But it has
79 been well said that if a corporation has itself no hands with which to strike, it may employ the hands of others; and it

is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents by authority of the corporation, express or implied. * * *

The result of the modern cases is that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person, and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal nor a vote of the corporation constituting the agency or authorizeing the act. * * *

"It is further objected that a corporation aggregate cannot be liable to indictment for a crime because the commission of the criminal act is not warranted by their corporate powers. This argument, pushed to its legitimate conclusion, would exempt a corporation from all liability for wrongs, civil as well as criminal. It is most aptly answered by Mr. Binney in his argument in the Chestnut Hill Turnpike Co. *vs.* Britter, 6 Binn., 12. According to the doctrine contended for, if they do an act within the scope of
80 their corporate powers it is legal, and they are not answerable for the consequences. If the act be not within the range of their corporate powers they had no right by law to do it; it was not one of the objects for which they were incorporated, and therefore it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice. * * *

"It is said again that the individuals who concur in making the order or in doing the work are individually responsible, and so is every servant or agent by whose agency a tort is committed, but it has never been supposed that the principal is therefore exempt from liability. On the contrary, the principle and the policy of the law has ever been to look to the principal rather than the mere agent; and in the case of corporations it is the clear dictate of sound law not only but of public policy to look rather to the corporation at whose instance and for whose benefit the wrong is perpetrated than to the individual directors by whose order the wrong was done, who may be entirely unknown, or to the laborers by whom the work was performed, who, in a great majority of cases, would be alike unknown and irresponsible." The authority of the agents and servants of the corporation and the approval and acceptance of
81 their work and its fruits by their principal may be proved by the acts and conduct of the corporation in relation thereto, whether the same are manifested by it collectively or through its officers, agents, tenants, etc. Angell & Ames on Corp., 9th Ed., sec. 186.

In Magil *vs.* Kauffman, 6 Binn., the supreme court of Pennsylvania held that evidence of the acts and declarations of the trustees and agents of the corporation, both before and after the incorporation, while transacting business relative to the corporation, as well as evidence of what passed at the meeting of the congregation when assembled on business in relation thereto, were admissible to show

the possession *of* the corporation of land and the extent of its claim of its boundaries.

We cite this authority in answer to the assumption of counsel for plaintiff in error that the acts and declarations of the agents of the defendant corporation on the trial below ought not to have been received in evidence to establish its liability for the acts of its agents, and to show that it was implicated in taking possession of the railroad in question and holding the same.

Under the modern and, as it would seem, controlling adjudications on the subject there can be no doubt, as a legal proposition, that if the defendant corporation (plaintiff in error here) in
82 any manner had formed the purpose of seizing, through its agents and employees, the Denver & Rio Grande Railway while in the peaceable possession of the Atchison, Topeka & Santa Fé Railway Co., and seizing the same by force, if necessary, and either directed, commanded, or counseled the same, or assented thereto, then it followed, as a matter of law, that the acts of its agents or employees in taking possession in pursuance thereof were the acts of the corporation, and if in taking such possession under such circumstances its agents or employees committed acts of violence, amounting to trespasses or torts for which an action would lie for damages, the corporation, as well as its agents and employees engaged in the same, would be liable to respond in damages to the injured parties; and as proper circumstancial evidence tending to prove the connection of the corporation with the acts of its agents in taking possession such acts of its agents, as well as their declarations in respect thereto and the object thereof, may be received, and if the corporation accepted and received into its possession and assumed control of the railroad so seized, and commenced and for a time continued to use and operate the same as its own, it would be a very strong circumstance indeed tending to establish the fact that its agents and employés, in taking possession, were acting
83 within the scope of their employment and under the direction of their principal.

The record discloses the fact that there was evidence on the trial in the lower court to the effect that about the tenth or twelfth of June, 1879, the Atchison, Topeka & Santa Fé Railway Co. was in peaceable possession, by its agents and employees, of a certain railroad in the State of Colorado, running from Alamosa to the city of Pueblo, in that State; that at or about that date, and while the Atchison, Topeka & Santa Fé Railway Co. were so in possession of said railroad, the plaintiff in error, the Denver & Rio Grande Railway Company, *Co.*, by an armed force of several hundred men, acting as its agents and employés, and under its vice-president and assistant general manager, attacked with deadly weapons the agents and employees of said Atchison, Topeka & Santa Fé Railway Co. having charge of said railroad, and forcibly drove them from the same, and took forcible possession thereof; that there was a demonstration of armed men all along the line of the railroad seized, and while this was being done, and the seizure was being made, the defendant in error, who was an employee of the Atchison, Topeka & Santa Fé

Railway Co. on said line of railroad, and while on the track
84 of the road, and on a hand-car thereon, in the line of his employment, was fired upon by men as he was passing and seriously wounded and injured; that immediately upon the seizure of the railroad as aforesaid the plaintiff in error accepted it, and at once entered into possession thereof, and commenced and for a time continued to use and operate the same as its own.

But, notwithstanding this strong circumstancial evidence, it is contended on behalf of the plaintiff in error that, inasmuch as there is no direct proof that the identical men who did the shooting had any specific orders or directions from the corporate authorities to act in the premises, we ought to assume that no such orders or directions existed, and that those particular men were acting entirely on their own behalf and independently of the corporation. This would be to- much like an assumption that skirmishers in battle, because somewhat detached from the main body of troops, did not belong to the army, but were fighting independently on their own account and without orders from the officer in command. All this might be possible, but the strong presumption would be the other way. The fact that these men committed the violent assault with deadly weapons at the time and place and in the manner and under the cir-
85 cumstances detailed in the evidence gives rise to a very strong presumption that they were a part of the armed force employed to seize the railroad.

These facts and circumstances, together with the declarations of the agents and officials of the plaintiff in error, under whom this armed force acted and from whom they received their directions, were competent to go to the jury as evidence tending to establish the corporation's liability. If the acts of trespass complained of were the acts of the agents, employees, or other persons on their own account, and were in no way authorized or sanctioned by the corporation, it was within the actual knowledge of some of its officers or agents, and could have been easily proved. No attempt of this kind having been made, the strong presumption arises that these armed men, including those who did the shooting, were acting in concert within the line of their employment by the corporation for the attainment of a specific object in its behalf. The question as to which of these railway companies was legally entitled to the line of railroad in controversy between them does not arise in this case. Even if the Denver & Rio Grande Railway Company had been legally entitled to the possession, it would not have justified
86 the manner of seizure. The excessive violence committed in either event would have constituted a trespass for which an action for damages would lie. We hold, therefore, that there was sufficient evidence submitted to the jury, which, if true—and it was for the jury to determine its credibility—justified a verdict for the plaintiff.

A long list of specific instructions, founded mainly on the ancient doctrine that a corporation was incapacitated from doing or sanctioning any act of its servants not authorized by its charter of corporate authority, thus exempting it from all liability for the wrong-

ful acts of its employees, though directed by its principal officers and managers, were asked to be given to the jury on behalf of plaintiff in error, and which were refused by the court, except two, one of which was given as demanded, and the other given with a part erased; to the ruling or the court on each one of which, except the one given, the defendant excepted.

All the unconditional refusals to charge as demanded were proper, and constituted no error. The instruction given by the court, as demanded by the defendant corporation, was as follows: "Agents or managers of the affairs of a railroad corporation, such
87 *such* as the defendant, cannot be legally employed by such company to shoot a person, nor are the officers, agents, or managers of such company, in the usual course of their employment as such officer, agent, or manager, authorized to employ anyone to shoot another person." This instruction was given in full, as demanded on behalf of the defendant corporation; there was no exception to this instruction on behalf of the plaintiff below, and we quote merely to show that it was more liberal to the defendant corporation than just. While it was true as a legal proposition, as far as it went, yet it was well calculated to mislead the jury. Having been given as an independant instruction, the jury might have inferred from its phraseology that if the company could not legally authorize its agents to commit the trespass in would not be liable. The instruction, to be proper, ought to have contained the qualifying words that notwithstanding the company could not legally authorize or sanction the wrongful act, yet if, as a matter of fact, it actually did not only authorize but sanction the same, it would be liable. The other instruction that was, as aforesaid, partly given and partly refused, is as follows: "Before a railroad company can be held liable for the willful act of any employee or agent
88 in shooting a person, or causing a person to be shot, it must appear from the evidence, to the satisfaction of the jury, that such employee or agent had been employed by the company, under authority of its board of directors, to do such acts, or that it in some way ratified the said act. Failing in such proofs in this case, the jury should find for the defendant." The latter claus- of this instruction was erased, evidently by the trial judge, and marked in the margin by him, so that it stands upon the record thus: "Given except as to part lined out."

This instruction was excepted to on behalf of the plaintiff in error on the ground that the entire instruction was not given, but the part that was given was open to the criticism of being liable to improperly mislead the jury, since they might have inferred therefrom that to render the corporation liable for the trespass committed by its agents or employees it must have been directed or sanctioned at some meeting of the board of directors, which, as we have seen from the authorities, does not follow as a necessary prerequisite to establish such liability, since the same may be implied or inferred from the acts of officials and agents of the corporation and
89 the attendant circumstances without any formal meeting of the board of directors to consider the matter.

The plaintiff in error cannot be injured or prejudiced by this instruction, as it is more in his favor than the law would seem to justify; but the erasure in this instruction is an irregularity under our statute, which provides as follows: "If the court refuse a written instruction as demanded, but gives the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow some such characterizing words as 'changed thus,' which words shall themselves indicate that the same was refused as demanded." Prince's Stat., 127, sec. 24. The erasure in this instruction by the judge was clearly a violation of the statute. But as the statute on the subject may properly be considered as directory merely and not mandatory, and as the erasure cannot be considered as prejudicial to the plaintiff in error, it is not such an irregularity as will justify a reversal. No substantial error appearing from the examination of the record, it is ordered that the judgment below be affirmed.

90 UNITED STATES OF AMERICA, *Territory of New Mexico:*

I, C. M. Phillips, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment given, and opinion filed in the cause herein mentioned as the same now appears remaining in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of New Mexico, at Santa Fé, this 1st day of April, A. D. 1884.

[Seal of Supreme Court, Territory of New Mexico.]

C. M. PHILLIPS, *Clerk.*

91 *Assignment of Errors.*

In the Supreme Court of the United States. December Term, A. D. 1884.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, Plaintiff in Error,

vs.

JAMES HARRIS, Defendant in Error.

And now comes The Denver and Rio Grande Railway Company, the plaintiff in error, by Edward O. Wolcott, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The trial court erred in allowing witness Hayt to testify, over the objection of the defendant, concerning the acts of certain ex-employés of the defendant company in taking possession of a switch engine and cars at Alamosa, Colorado, and to the additional fact that said switch engine and cars left Alamosa with two hundred armed men on board the same in charge of one ex-Gov. Hunt, and also in allowing said witness to testify as to the various acts and

doings, and each and every of them, of said armed men between Alamosa and Pueblo, Colorado (*vide*, folios 32 to 43, inclu-
92 sive, transcript of record), for the reason that the whole and every part of said testimony was irrelevant and immaterial, it not being shown or contended that the plaintiff was assaulted by any of said men, and there being no evidence (except hearsay) showing or tending to show that said armed men were at the time in the employ or acting under the authority or direction of the defendant company.

2nd. The trial court also erred in allowing witness C. F. Meyer to testify, over the objection of the defendant company, concerning the fact that certain attorneys representing the Denver and Rio Grande Railway Company appeared at San Luis, Costilla county, Colorado, at the June term, 1879, of the district court for said county, and in also permitting said witness to testify that he saw some armed men on the 10th or 11th of June, 1879, at Fort Garland, Colorado, in charge of a man named Anderson, and in also permitting said witness to testify that said Anderson told witness he was in the employ of the Denver and Rio Grande Company, and was going across the mountains to Cucharas, and in also permitting said witness to testify that about the 20th of June, 1879, he saw a train of
93 cars at Fort Garland coming from the direction of Alamosa with armed men on board, all of said testimony and every part thereof being irrelevant, incompetent, and immaterial, there being no evidence in said cause showing or tending to show that the armed men seen by witness ever assaulted the plaintiff, or were in anywise connected with the shooting in which plaintiff was wounded, nor, except by hearsay, that the said armed men were in the employ or acting under the authority or direction of the defendant company. (*Vide*, folios 43 to 46, inclusive, transcript of record.)

3rd. The trial court also erred in refusing to give to the jury the following instruction asked for by defendant, to wit: "In this cause there is no evidence that the man who did the firing which injured the plaintiff was in any manner in the employ of the defendant for any purpose. That being the case, the jury should find for defendant." (*Vide*, folio 87, transcript of record.)

4th. The trial court erred in giving to the jury, at the request of the plaintiff, the following instruction (duly excepted to by the
94 defendant), to wit: "The damages are wholly within your discretion, but since the plaintiff claims ten thousand dollars only you cannot in any view award him a greater sum than ten thousand dollars." (*Vide*, folio 93, transcript of record.)

5th. The trial court erred in giving to the jury, at the request of the plaintiff, the following instruction (duly excepted to by the defendant), to wit: "In estimating damages you may consider the effects that, in your judgment, will probably follow throughout the plaintiff's life as a result of the injury; and if you believe from the evidence that the plaintiff has been deprived of virility and rendered sexually impotent by reason of the defendant's wrong proved you can award damages to compensate him for the deprivation which he

may suffer in loss of any comforts of marriage and the power to have offspring." (*Vide*, folio 94, transcript of record.)

By reason whereof the plaintiff prays that said judgment may be reversed, etc.

By EDWARD O. WOLCOTT,
Attorney for Plaintiff in Error.

Endorsed on cover: New Mexico supreme court. No. 290. The Denver and Rio Grande Railway Company, plaintff in error, *vs.* James Harris. Filed 9th September, 1884.

122-59

FILED
MAY 3 1887
JAMES H. McKENNEY,
CLERK

—IN THE—

SUPREME COURT,

—OF THE—

UNITED STATES.

DECEMBER TERM, A. D. 1884.

THE DENVER & RIO GRANDE RAILWAY COMPANY, *Plaintiff in Error,* *vs.* JAMES HARRIS, *Defendant in Error.*	No. Error to the Supreme Court of New Mexico.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

—IN THE—

SUPREME COURT,

—OF THE—

UNITED STATES.

DECEMBER TERM, A, D. 1884.

THE DENVER & RIO GRANDE RAILWAY COMPANY, *Plaintiff in Error,* *vs.* JAMES HARRIS, *Defendant in Error.*	No. Error to the Supreme Court of New Mexico.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action of trespass commenced by the defendant in error in the First Judicial District Court of the Territory of New Mexico, for the County of Santa Fe,

against the plaintiff in error, a body corporate created and organized under the laws of the State of Colorado, to recover damages for injuries to the person of the defendant in error occasioned by an unlawful assault committed by alleged servants and employes of the plaintiff in error, occurring in the State of Colorado. The defendant in error recovered a verdict and judgment in the trial Court for nine thousand dollars which was affirmed on writ of error by the Supreme Court of the Territory of New Mexico. To reverse these judgments is the purpose of the present writ of error.

PLEADINGS.

The petition or declaration of the plaintiff alleges that on the 11th day of June, A. D. 1879, at a place known as Cucharas, in the State of Colorado, certain agents and servants of the defendant company unlawfully and feloniously assaulted the plaintiff, and by the direction and instigation of the defendant then and there discharged certain loaded firearms at the plaintiff, a bullet from which struck the plaintiff, inflicting a serious wound, and thereby disabled him to his damage in the sum of ten thousand dollars.

Plea—General issue.

Upon the trial of the cause the plaintiff introduced as witnesses Walter V. Hayt and C. F. Meyer and testified as a witness in his own behalf. As error is assigned upon the action of the trial Court in permitting the witnesses Hayt and Meyer to testify to certain facts and statements to which objection was made by the attorneys for the plaintiff in error, it will be necessary to refer to the testimony of these witnesses hereafter.

ASSIGNMENT OF ERRORS.

First—The trial Court erred in allowing witness Hayt to testify, over the objections of the defendant, concerning

the acts of certain former employes of the defendant company in taking possession of a switch engine and cars at Alamosa, Colorado, and to the additional fact that said switch engine and cars left Alamosa with two hundred armed men on board the same, in charge of one Ex-Governor Hunt. And also in allowing said witness to testify as to the various acts and doings, and each and every of them, of said armed men between Alamosa and Pueblo, Colorado (vide folios 32 to 43 inclusive transcript of record), for the reason that the whole and every part of said testimony was irrelevant and immaterial, it not being shown or contended that the plaintiff was assaulted by any of said men, and there being no evidence, except hearsay, showing or tending to show that said armed men were *at the time* in the employ or acting under the authority or direction of the defendant company.

Second—The trial Court also erred in allowing witness C. F. Meyer to testify, over the objection of the defendant company, concerning the fact that certain attorneys representing the Denver and Rio Grande Railway Company appeared at San Luis, Costilla County, Colorado, at the June Term, 1879, of the District Court for said county; and in also permitting said witness to testity that he saw some armed men on the 10th or 11th of June, 1879, at Fort Garland, Colorado, in charge of a man named Anderson, and in also permitting said witness to testify that said Anderson told witness he was in the employ of the Denver and Rio Grande Company, and was going across the mountains to Cucharas; and in also permitting said witness to testify that *about the 20th of June, 1879*, he saw a train of cars at Fort Garland coming from the direction of Alamosa with armed men on board—all of said testimony and every part thereof being irrelevant, incompetent and immaterial, there being no evidence in said cause showing or tending to show that the armed men seen by witness ever assaulted

the plaintiff, or were in anywise connected with the shooting in which plaintiff was wounded, nor, except by hearsay, that the armed men were in the employ or acting under the authority or direction of the defendant company (Vide folios 43 to 46 inclusive transcript of record).

Third—The trial Court also erred in refusing to give to the jury the following instruction asked for by defendant, to wit:

"In this cause there is no evidence that the man who "did the firing which injured the plaintiff was in any man- "ner in the employ of the defendant for any purpose—that "being the case the jury should find for the defendant." (Vide folio 87 transcript of record.)

Fourth—The trial Court erred in giving to the jury at the request of the plaintiff the following instruction (duly excepted to by the defendant), to wit:

"The damages are wholly within your discretion, but "since the plaintiff claims ten thousand dollars only you "cannot in any view award him a greater sum than ten "thousand dollars." (Vide folio 93 transcript of record.)

Fifth—The trial Court erred in giving to the jury at the request of the plaintiff the following instruction (duly excepted to by the defendant), to wit:

"In estimating damages you may consider the effects "that *in your judgment* will probably follow throughout the "plaintiff's life as a result of the injury; and if you believe "from the evidence that the plaintiff has been deprived of "virility and rendered sexually impotent by reason of the "defendant's wrong proved, you can award damages to "compensate him for the deprivation which he may suffer "in loss of any comforts of marriage and the power to have "offspring." (Vide folio 94 transcript of record.)

The foregoing assignment of errors will be separately discussed in the order in which they are presented.

I.

The entire testimony taken upon the trial of the cause is preserved in the record, for the reason, that certain of the assignments of error cannot be intelligently considered by the Court without the aid of the evidence. Although contrary to the usual practice of this Court, yet in view of the limited proportions of the testimony (being but twelve printed pages in all) and the fact that the correctness of the action of the trial Court in giving and refusing certain instructions which depend upon the construction and effect to be given to the proofs, we think that this Court will readily give a patient and careful consideration to the evidence in determining the questions involved.

The plaintiff in error contends that all of the testimony of the witness Walter V. Hayt, referred to in the first assignment of errors, should have been excluded from the jury, and that it was manifest error to permit him to testify to the various matters involved in his statements.

It will be born in mind that the plaintiff avers, both in his declaration and in his testimony, that he was shot at or near Cucharas, on the line of the Denver and Rio Grande Railway in Colorado, and that he testified when examined as a witness in chief that the shooting in which he was hit took place between one and two o'clock at night either on the 10th or 11th of June, 1879.

The testimony of the witness Hayt relates entirely or mainly to certain acts done by former employes of the defendant company on the morning of the *12th of June* of that year at Alamosa, a place nearly ninety miles distant from where plaintiff was wounded, without showing or attempting to show that the armed men seen by witness at Alamosa were in any wise connected with the party of men who opened fire upon and shot the plaintiff. Conceding that the proof disclosed the fact that both the body of men who seized the train of cars at Alamosa on June 12th and the

party who attacked the plaintiff at midnight on June 10th or 11th at Cucharas were in the employ of the defendant, how could it have been either relevant or material to the issues in the case, or any of them, to establish such facts? the sole effect of such testimony would be to inflame the jury against defendant, by showing the commission of various acts of alleged lawlessness perpetrated in different localities of Colorado by persons claiming to be acting in the interests of defendant company. Again, a careful examination of the testimony of this witness will disclose the fact that he had no personal knowledge or information of any facts or circumstances which could or did enable him to testify of his own personal knowledge that the various acts done by the force of armed men who took possession of the train at Alamosa were *in fact* committed by persons in the employ or acting under the authority of the defendant company.

It appears from the testimony of Hayt that in the winter of 1878 the Atchison, Topeka and Santa Fe Railroad Company took peaceable possession of the Denver and Rio Grande Railroad, but under what arrangement—whether by purchase or lease—is not disclosed. It is reasonably clear, however, from the statement of this witness, that the change of possession was with the consent of the Denver and Rio Grande Company. Immediately after taking possession the Atchison Company discharged all or nearly all of the old employes, and this action created a bitter feeling on the part of the discharged men against that company, and to use the language of the witness "the thing came to a focus early in June, 1879." Following this statement the witness proceeds to detail what these *discharged* employes did at Alamosa and other points under the charge of one Ex-Governor Hunt. It is true that in his examination in chief Hayt speaks of Hunt as an officer of defendant company, but in his cross-examination (vide

folios 42 and 43) witness admitted that he only knew this fact from the statements of Hunt himself and the fact that witness knew that Hunt had been an officer of the Rio Grande Company prior to its surrender of the road in 1878 to the Atchison Company.

The entire testimony of this witness relates solely to the apparently lawless acts of certain former employes of defendant company, who, infuriated by their wholesale dismissal from service by the Atchison Company, sought to revenge themselves by taking forcible possession, in the name of the defendant company, of certain rolling stock and property from the Atchison Company, without showing or tending to show that the defendant company as such ever authorized or ratified any of these various acts. This, too, is coupled with the additional fact that there is no sort of connection established between the acts of the men spoken of by witness Hayt and those of the particular body of men who opened fire on plaintiff about a mile and a half from Cucharas station. It was mere assumption on the part of the witness that the discharged employes who took forcible possession of the property mentioned were proceeding under the authority of the defendant corporation from the mere fact that they claimed to be acting in its interest; but the Court will examine the testimony in vain for any evidence that any officer or agent of the defendant company, proved to be such by competent testimony, was in any manner connected or identified with the various proceedings related by this witness. "The mere fact that a "servant assumes to act for his master in a certain transac-"tion has no tendency to establish his authority to do so "beyond the powers incident to his employment."

Woods Master and Servant, Sec. 273.

All of these objections apply with equal force to the whole of the testimony of the witness C. F. Meyer, to which reference is made in the second assignment of errors,

and we therefore deem it unnecessary to enter into any special discussion of that assignment.

II.

The third assignment of error presents the question whether the trial court erred in refusing to direct the jury to return a verdict for the defendant.

It is now the settled rule of this Court that "the Judges "are no longer required to submit a case to the jury merely "because *some* evidence has been offered by the party "having the burden of proof, unless the evidence be of such "a character that it would *warrant* the jury to proceed in "finding a verdict in favor of the party adducing such "evidence."

Commissioners, etc., vs. Clark, 94 U. S., 278–284, per Mr. Justice Clifford.

An instruction under such circumstances directing a verdict for the defendant "may be properly demanded, and "it is in the duty of the Court to give it and error to re-"fuse it."

Hickman vs. Jones, 9 Wall., 197.

Does the record show that the plaintiff introduced *sufficient* evidence to warrant the jury in finding—first, that the person who shot the plaintiff was at the time a servant or agent of the defendant for any purpose, and, second, that the act of shooting the plaintiff was either expressly ordered by the defendant, or was done by the assailant within the scope and course of his employment as the defendant's agent or servant? The plaintiff in error insists that it does not.

In reviewing the evidence relating to this branch of the case it will be only necessary to examine the testimony given by the plaintiff himself. No other witness introduced upon the trial had any knowledge, either personal

or otherwise, of the circumstances attending the shooting in which the plaintiff was injured, nor was there any attempt made to connect the particular persons engaged in the firing with the defendant except by the plaintiff's own statements. This testimony is included in folios 52 to 82 of the transcript of record.

The plaintiff testified in his examination in chief, in substance, that on the night he was shot he was in the employ of the Atchison, Topeka and Santa Fe Railroad Company in the capacity of an armed guard or watchman, at Cucharas station on the line of the Denver and Rio Grande Railroad, in Colorado. The nature of his duties is left wholly to conjecture, but it may be assumed that they were to protect the property of the Atchison Company from any forcible attempt of dispossession or spoliation, apprehended either upon the part of the discharged employes of the former company acting from a spirit of revenge or by the Denver and Rio Grande for its own purposes.

On the night of the 10th or 11th of June, 1879, at about eleven o'clock, a train of cars approached Cucharas station from the direction of El Moro, a terminus of the road in the southern part of the State, and as the train neared the depot where plaintiff and his co-employes were stationed, some persons on the train opened fire on plaintiff. The fire was returned by him and his fellow-guards. This engagement continued about fifteen minutes, no one being hurt, and then a person, identified by plaintiff as one Mike Green, gave orders to stop firing. The conflict then ceased. The plaintiff did not identify any of the persons engaged in this shooting, and, except as a matter of mere conjecture, nothing was stated explaining where the men came from, what became of them subsequently or their purpose in commencing these acts of hostility. The person spoken of as Mike Green was stated by the witness to be "roadmaster of the D. & R. G." The designation could

have reference only to the railroad, and not to the defendant company, for the reason that it appeared from the testimony, and was not controverted, that the Denver and Rio Grande *Railroad* was in the possession of and solely operated by the Atchison, Topeka and Santa Fe Company at the time of the assault on plaintiff, and for many months prior thereto. The roadmaster mentioned, therefore, must necessarily have been in the employ of the latter company in that capacity, and not in that of the defendant company.

The question, however, is of but little practical importance, as the plaintiff was injured about two hours subsequent to this melee at another place, and by an entirely different party of men. The pivotal question in the case is, were the last mentioned body of men the agents or servants of the defendant, so that it is bound by their act in assaulting and wounding the plaintiff?

After the cessation of hostilities already mentioned, the plaintiff and his comrades, about *one o'clock* in the morning, started for Pueblo on two hand cars. The party had proceeded on the railroad unmolested about a mile and a half when after passing through a cut, to use the language of plaintiff, "we run on to a body of men who were scat-"tered across it. * * * Just as we came up to them "they turned loose on us a volley of shots—could not tell "how many—and I was hit by that volley. I was hit by "bullets—was hurt in the right side. * * * The ball "went in here, and came out here (showing the jury about "the hip)." The plaintiff stated that the man in the attacking party who shot him was a Mexican, but he was not acquainted with him, nor had he ever seen him before. No evidence was given as to who directed or commanded the firing or why it was commenced, nor as to who had immediate charge of the force of men when the firing *began.* No evidence was given as to who stationed the men about the cut, nor for what purpose they were placed there,

nor was there any evidence, except as hereafter noticed, connecting or tending to connect this assaulting party with the defendant company.

The attention of the Court is now specially directed to that portion of the plaintiff's testimony in which he attempts to cast the responsibility of this last attack upon the defendant.

At folio 60 (transcript of record) the plaintiff, after having detailed the circumstances of the assault as above narrated, continues: "Just then (i. e. when lying on the "ground wounded) I saw an engine between me and "Pueblo, right north of me. * * * *I lay there about "half an hour.* The engine I saw came moving up towards "us, and I thought I knew the crowd that was *on the train*, "and hollered saying 'is Ben Smith on that train?' 'No, "Ben Smith is not here, but Capt. Anderson is.' Capt. "Anderson was one of the directors of the road, *as I "thought.*' He done the employment; he had charge of "the D. & R. G. forces who shot me." The Court will here remember that the first time this Capt. Anderson appeared on the scene, or was observed by the plaintiff, was on board the train that was some distance away in the direction of Pueblo when the firing began, and that the train did not reach the place of the shooting for about half an hour after the plaintiff was wounded, It was impossible, therefore, for Anderson to have been in the immediate charge of the men who attacked the plaintiff, or that he could have been identified therewith. It is quite obvious from the entire testimony that the statement to the effect that Anderson had charge of the forces who shot plaintiff, or that such forces were in any wise connected with the defendant corporation, is purely an assumption on the part of the witness unsupported by any facts or means of information which would justify or warrant him in making that assertion. The justness of this criticism becomes further

apparent upon consideration of the cross-examination of the witness. The plaintiff's surmise that Anderson was a director of the road is, of course, entitled to no weight, as the witness did not claim to know, nor was there any attempt made thereafter to show, that he occupied any such position.

In cross-examination (folios 74 and 75) plaintiff states that he was shot in the hip, and that the men who fired at him, between twenty and forty in number, were lying down and suddenly rose up and opened fire. At folios 78 and 79 witness continues: "The party was in charge of Capt. "William Anderson. It was not under the charge of the "Sheriff of Huerfano County *that I know of*. I did not "know the sheriff, and do not know that he was not there "that night. *I do not know that he was not in charge of the "party*. Only Capt. Anderson required me to surrender "my arms. *All that I know* is that I was going on that "railroad that night in a hand car, and a party of thirty or "forty men raised up in front, and that I was injured, and I "knew that they had parties along there every day, and "they had the section house there filled with arms to use "on me."

Q. Who do you mean by they?

A. I mean to say Capt. Anderson and some of the working force—men who were working every day on that road *in the employ of the Santa Fe Company*, but with the feelings against them *turned traitors*, and fired on us that night.

Q. Employes of the Atchison, Topeka and Santa Fe Railroad Company?

A. Yes, sir; under pay of Capt. Anderson of the Denver and Rio Grande, and getting eight dollars a day.

This concludes every particle of evidence taken on the trial bearing directly or indirectly upon the question of whether the man or men who discharged the firearms at

plaintiff at the time and place he was wounded were then and there the agents and servants of the defendant company, and in so shooting were acting within the scope of their employment as such servants or agents. It is respectfully submitted that this evidence, taken as a whole, is not of such a character as would warrant a jury in finding both propositions, or either of them, in the affirmative.

The plaintiff admitted in cross-examination that he was not able to state but that it was a fact that the attacking party was in charge of the Sheriff of Huerfano County as a *posse comitatus*, stationed there to preserve the peace in anticipation of trouble between the present and former employes of the road. It was a mere conjecture that Anderderson was in charge of the party, founded solely upon the fact that he came upon the ground about half an hour after the shooting, coming from the direction of Pueblo upon a train of cars, and that after the coming up of the plaintiff he demanded his arms. It may be conceded for the purposes of the argument that Anderson was an officer of the defendant corporation, and that he was in charge of the train upon which he was riding; but how can this solitary circumstance be treated as sufficient evidence to find that the thirty or forty men who attacked the plaintiff about half an hour before Anderson ever came upon the ground were under his charge, or were ever in the employ of the defendant for any purpose?

The plaintiff claims that he recognized on the following morning the identical man who shot him the night before, but he does not assert or pretend that he ever saw that person in the employ of either company before that time, or that he ever knew him to be so employed.

Giving the widest possible latitude to the entire testimony on the part of the plaintiff, and concluding therefrom that the defendant corporation as such was engaged in the unlawful purpose of taking forcible possession of the rail-

road and appurtenances from the Atchison Company, and had employed armed men to aid it in this illegal enterprise, can it be seriously contended, as a legal proposition, that the defendant is civilly liable for every wanton and murderous assault, that might be made by any and every body of men along the entire line of the road, without proof that the particular body of men so acting, were in fact *at the time* in the employ of the defendant, and that in making such assault they were acting within the general scope of their employment as the servants of defendant? Certainly not, and yet this is virtually the position taken by the trial Court, and the Supreme Court of New Mexico in its judgment of affirmance.

It may be conceded in the language of Mr. Justice Clifford in Commissioners, etc., vs. Clark, supra, that there is "*some*" evidence in the record that the particular body of men who attacked the plaintiff were *at the time* in charge of Capt. Anderson, that Anderson was then and there in fact an officer of the defendant corporation, and that the assault made upon plaintiff was committed in the line or course of the employment of the attacking party as defendant's servants; but can it be successfully affirmed as a legal proposition that the evidence disclosed in the record bearing upon these questions is "of such a character" as would "warrant" a jury in finding in the affirmative upon each and every of these contested points? The plaintiff in error insists that this Court cannot so hold.

The Supreme Court of New Mexico fully realized the weakness of the plaintiff's proof upon these vital questions, and sought to answer the position here taken by plaintiff in error by saying (folio 172) "it is contended * * * "as there is no direct proof that the identical men who did "the shooting had any specific orders * * * from the "corporate authorities * * * we ought to assume "that no such orders or directions existed. * * * This

"would be too much like an assumption that skirmishers "in battle because somewhat detached from the main body "of troops did not belong to the army, but were fighting "independently on their own account."

This style of logic may be termed, without incurring the charge of levity, a skirmishing argument. The learned judge who delivered it is wholly at fault in his premises. He assumed without proof, and independent of any process of reasoning, that the attacking party was in fact a part and parcel of the main forces of the defendant company, and further assumed that because the evidence indicated that the Rio Grande Company had in its employ at certain points along the line of the road bodies of armed men it was a legitimate presumption that every armed force who might suddenly attack any of the employes of the Atchison Company should be *prima facie* treated as being in the pay and hire of the defendant company, and acting under its orders; and this, too, in the face of the fact disclosed by the evidence, that the discharged employes of the Atchison Company entertained feelings of bitter hostility against it, and the legitimate inference arising therefrom that these men, whether employed by the defendant or not, would quickly seize upon the opportunity presented by the conflict between the rival corporations to commit acts of lawlessness upon their own account.

In conclusion upon this branch of the case the plaintiff in error insists that there was not sufficient evidence before the jury to warrant them in finding that the defendant in error was assailed by servants of the plaintiff in error, or by persons for whose acts it is legally responsible, and that there was as a necessary result manifest error committed by the trial Court in the declining to direct a verdict for the plaintiff in error.

III.

The fourth assignment of error relates to the instruc-

tion given by the Court upon the subject of punitive or vindictive damages.

In the instruction here excepted to the jury were told in effect that they were at liberty to give the plaintiff whatever amount of damages they were disposed to award not in excess of the amount demanded, to wit: ten thousand dollars.

This assignment presents for consideration the much-mooted question of whether a master, either natural or artificial, can be compelled to respond in exemplary damages for the wanton and malicious acts of his servants, in the absence of proof that the master directed or authorized the servants to commit the particular trespass or wrong complained of.

In all of the adjudged cases defining the liability of a master for the unlawful acts of his servant, this limitation is universally stated to exist—namely, "that the act done "by the servant must be one commiited by him in doing "something the master employed him to do, and an inci-"dent of the execution of the duty."

In behalf of plaintiff in error it is contended that while a master may be accountable to an injured party to the extent of compensatory damages for the wrongful acts of his servant, provided the servant is acting within the general scope of his employment in committing the injury, even though the master may not have authorized or may have even forbidden the doing of the particular act complained of, yet he cannot be mulcted in exemplary damages unless he directed the servant to commit the special wrong in question in such manner as to personally identify himself with the servant in the perpetration of the injurious act.

To illustrate, suppose it be admitted for the sake of argument that the body of men who attacked the plaintiff were in fact in the employ of defendant at the time of the assault, and that the general scope of their employment

was to aid the defendant in its general plan of retaking possession of the line of railroad from the Atchison Company, without any proof however that the defendant company or any of its officers ever directed or authorized the attack on plaintiff, and without any proof that such servants were placed or stationed at or about the scene of action by the defendant or any of its officers for the purpose of assaulting any person or persons whomsoever, and so far as the evidence discloses, the attack on plaintiff being occasioned either by some misapprehension on the part of the attacking party as to the purpose of the plaintiff and his comrades in approaching them in the night-time under the circumstances as detailed in the evidence, or prompted by mere wantonness on their part without the instigation or acquiesence of defendant or its officers,—then, while it might follow as a legal proposition that the defendant would be liable for the acts of its servants under such circumstances to the extent of compensating the plaintiff for injuries occasioned by the assault, upon the ground that the attack upon plaintiff might be said to be within the general scope of the employment of the attacking force, and an incident thereof, yet under the authority of the best reasoned cases on this subject, it would not be proper to visit upon the defendant a punishment in the form of exemplary damages as was done in this case in the trial Court. The only instance in which this particular question ever came before this Court directly for adjudication, so far as discovered by the research of Counsel, was in the suit of "The Amiable Nancy," 3 Wheat, 546. In that case the owners of an American privateer were sued for the commission of a marine trespass. An armed boat's crew belonging to the privateer had boarded a schooner called the "Amiable Nancy," a Haytian vessel belonging to a neutral nation or country with which the United States was at peace, and plundered the schooner of her papers, cargo and equipment, and

grossly abused and ill-treated her crew and officers. Mr. Justice Story in delivering the opinion of the Court said:

"Upon the facts disclosed in the evidence this must be "pronounced a case of gross and wanton outrage without "any just provocation or excuse. Under such circum- "stances, the honor of the country and the duty of the "Court equally require, that a just compensation should be "made to the unoffending neutrals for all the injuries and "losses actually sustained by them. And if this were a "suit against the original wrong-doers it might be proper to "go yet further and visit upon them in the shape of exemp- "lary damages the proper punishment which belongs to "such lawless misconduct. But it is to be considered that "this is a suit against the owners of the privateer upon "whom the law has, from motives of policy, devolved a "responsibility for the conduct of the officers and crew "employed by them. * * * Under such circumstances "we are of the opinion that they are bound to repair all "the real injuries and personal wrongs sustained by libel- "lants, but they are not bound to the extent of vindictive "damages."

This Court has in other instances, in deference to a mass of adjudged cases, reluctantly recognized exemplary damages as having obtained a foot-hold in our jurisprudence where the wrong complained of was conceived and committed in the spirit of mischief and "criminal indifference, or wilful or reckless indifference;" and, as was said in Milwaukee &c. R. R. Co. vs. Arms et al., 91 U. S., 489, "The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages." See

Day vs. Woodworth, 13 How., 371.

Philadelphia &c. Co. vs. Quigley, 21 How., 202.

In Milwaukee R. R. Co. vs. Arms et al., supra, the right to recover exemplary damages against the defendant

company in that suit was denied. It may be contended, however, that there are expressions contained in the opinion of the Court in that case which would imply that in cases of wilful misconduct on the part of employes of a railroad company an injured party could recover exemplary damages from the corporation, irrespective of the fact whether it or any of its managing officers instigated or directed the doing of the wrongful act. It is sufficient to say in response to this that it was not necessary for the determination of that case for the Court to pass upon the principal question at all. The Court found as a matter of law that upon the facts shown in the record exemplary damages ought not to have been awarded against the railroad company, and we do not understand that it was the purpose or intention of the Court to go beyond this, and define the limits within which the allowance of exemplary damages in other cases would be proper. Expressions or *dicta* unnecessary in the determination of a controversy are never regarded as authority. The case of "Amiable Nancy," supra, and all succeeding cases can therefore be readily reconciled and stand together without impugning the correctness of the ruling in either instance.

The theory upon which the doctrine of exemplary damages is solely founded is the infliction of a punishment for the commission of an intentional wrong. There must be an evil intent or motive animating the person in doing the act before punitive damages can be imposed. So essential is this ingredient of personal intent or motive that infants, persons *non compos mentis* and municipal corporations are wholly excluded from the operation of the doctrine.

Field on Damages, Sec. 79 and 80, and cases cited.

If in fact the plaintiff was injured by some person connected with the defendant corporation, why should that company be punished by the infliction of a pecuniary fine,

in the form of a verdict for damages in an amount which may be thousands of dollars in excess of what would be sufficient to compensate the plaintiff for all his actual losses and injuries, when there is not a scintilla of evidence to the effect that the defendant company or any of its representative officers ever intended to injure the plaintiff, or ever directed the commission of the act producing the injury.

The propriety of enforcing the rule in any case has been and is vigorously combatted by able jurists and judges, and as it is confessedly in conflict with the reason and philosophy upon which damages are awarded in civil actions its application should be restricted rather than enlarged.

These views have been approved in the following cases and in the majority of them the limitation here contended for—to wit, that the master, whether natural or artificial, is not responsible beyond actual damages for the misconduct of his servant, unless he directed the act or personally participated in its commission, has been established.

Turner vs. North Beach & Mission R. R. Co., 34 Cal., 594.

Wade vs. Thayer, 40 id., 578.

Mendelsohn vs. Anheim Lighter Co., id., 657.

Wardrobe vs. Cal. Stage Co., 7 id., 119.

Hagan vs. Providence &c. R. R. Co., 3 R. I., 88.

Detroit Daily Post Co. vs. McArthur, 16 Mich., 447.

Great Western R. R. Co. vs. Miller, 19 id., 305.

Craker vs. Chicago & N. W. R. R. Co., 36, Wis., 657.

Milwaukee & Miss. R. R. Co. vs. Finney, 10 id., 388.

Hamilton vs. Third Ave. R. R. Co., 53 N. Y., 25.

Cleghorn vs. N. Y. C. R. R. Co., 56 id., 44.
Ackerson vs. Erie R. W. Co., 3 Vroom N. J., 254.
Hill vs. N. O. &c. R. R. Co., 11 La., 292.
Boulard vs. Calhoun, 13 id., 445.
Belknap vs. Boston &c. Co., 49 N. H., 358.
Field on Corporation, Sec. 386.
See also an able Article on this subject by Hon. H. M. Hubbard in note to Section 98, Field on Damages.

A further limitation is imposed by a number of Courts, to wit: that where the act committed is in itself an offense punishable criminally, then punitive damages cannot be awarded, for the reason that it would be in violation of the Constitutional provision that no person can be subjected to double punishment for the same offense. If this limitation should meet the approval of this Court it follows necessarily that the master cannot be held to any greater liability to the injured party than would the servant were he sued instead of the principal. The following cases enforce this last mentioned limitation:

Boyer vs. Burr, 8 Neb., 68.
Smith vs. R. R. Co., 23 Ohio St., 10.
Hayner vs. Cowden, 27 id., 292.
Huber vs. Tueber, 3 McArthur, 484.
Fay vs. Parker, 53 N. H., 342.
Lucas vs. Flynn, 35 Iowa, 9.
Mooney vs. Kennell, 19 Mo., 551.
Austin vs. Wilson, 4 Cush., 273.
Koener vs. Oberly, 56 Ind., 284.
Farman vs. Lanman et al,, 73 id., 568.

This branch of the argument is submitted with the conviction that it will be held by this Court that upon the entire evidence the doctrine of exemplary damages was not properly applicable as against the defendant corporation, and the instruction of the trial Court to that effect was

such error as requiers a reversal of the judgment now under review.

IV.

The fifth and last assignment of error presents for consideration the correctness of the instruction given to the jury that in estimating damages the jury should award compensation to plaintiff for loss of virility and sexual vigor produced by the gunshot wound in the hip, and also for loss of the comforts of marriage and the power to procreate resulting from the same cause.

It is insisted that this instruction was palpably erroneous, for the reason that under the pleadings in the case the plaintiff was not entitled to recover damages for such alleged special, peculiar and abnormal results. An examination of the averments in the plaintiff's declaration (folio 8) on the subject of his alleged injuries will show that the plaintiff simply counted on general damages under the general *ad damnum*, and there is not the slightest intimation contained in the entire pleading that the plaintiff would claim any loss of sexual vigor as a consequence of the wound in his hip.

The correct test in determining what elements of injury are recoverable under a general averment of damages is stated with great clearness and precision by Ruggles, J., in Vanderslice vs. Newton, 4 Com. N. Y., 132:

"The general rule * * * is that the plaintiff is "entitled to recover as a recompense for his injury all the "damages which are the natural and proximate consequence "of the act complained of (citing 2 Greenleaf, Sec. 256). "Those which necessarily result from the injury are termed "general damages, and may be shown under the general "allegation of damages at the end of his declaration. But "such damages as are the natural although not the neces- "sary result of the injury are termed special damages, and

"must be stated in the declaration to prevent a surprise "upon the defendant."

In Bristol Manufacturing Co. vs. Gridley, 28 Conn., 212, Mr. Justice Ellsworth, in an elaborate discussion of this special question, *inter alia*, says:

"Every judge will agree that all damages must be the "result of the injury complained of. * * * If they "necessarily result, such as * * * loss of time and "the endurance of pain consequent upon having one's limb "fractured, they are called general damages, and may be "shown under the *ad damnum* or general allegation of "damage, for the defendant does not need notice of such "consequences for his defense; he knows that they must "exist of course, and that they are proximate and will be "in evidence on the trial. But if certain injuries and losses "do not necessarily result from the defendant's wrongful "act, but in fact follow it as a natural and proximate conse-"quence, they are called special and must be specially al-"leged that the defendant may have notice and be prepared "to go into the inquiry. * * * As an illustration:— "the loss of one's business, * * * the loss of marriage "and the like cannot be proved unless specially alleged."

In the case of Hunter vs. Stewart, 47 Me., 419, the plaintiff, an unmarried female, sued the defendant, a stage proprietor, for injuries sustained in consequence of the alleged negligent upsetting of a coach in which she was a passenger. The averments of the injury were general, as in the case at bar. The trial judge instructed the jury that if the injury sustained by the plaintiff was permanent they might consider whether her prospects for marriage would be thereby impaired, and if so, they should compensate her therefor. The judgment was reversed in the Supreme Court for error in the giving of the above instruction. Appleton, J., said: "Special damages are such as are super-"added to and do not necessarily flow from the injurious

"acts of the defendant. The latter, to prevent surprise, "must be specially set forth in the declaration." See also

Hart vs. Evans, 8 Burr, 14.
Laing vs. Colder, id., 497.
Lowden vs. Goodrick, Peake's N. P., 46.
2 Greenleaf's Ev., Sec. 254, 13 Ed.
Sutherland on Damages, Vol. I., 766.

In applying this rule, so clearly established by numerous well-reasoned cases, to the present case there can be little if any difficulty in arriving at the conclusion that it was flagrantly violated in the giving of the instruction involved in the last assignment of error.

It certainly needs no argument to prove that sexual impotence, and the inability to procreate, and the consequent disability to lawfully enter into the marriage relation, is not a necessary, usual or even probable result of a gunshot wound in the hip; in fact, such a consequence is so highly improbable and unusual as to raise a serious and rational doubt whether the plaintiff is not mistaken in attributing his peculiar veneral condition to the wound received, when other potent and suggestive reasons, in the light of his habits and avocations, would naturally suggest themselves.

However this may be, the *gravamen* of the plaintiff's injury in this respect, regarded from a legal standpoint, is his alleged inabilty to lawfully contract marriage, and if it be true that the effect of the bullet wound, inflicted as it is said by one of defendant's servants, was virtually to emasculate him, then this was a special damage which the defendant had a right to demand should be charged in the declaration before the plaintiff could be permitted to recover damages therefor. This alleged peculiar physiological result or condition is of necessity a secret, hidden one, which in the usual course of things would never be anticipated by the defendant in preparing for his defense. The plaintiff to all outward appearances might be physically sound and

vigorous and yet, from some cause, be sexually debilitated, and if upon the trial for the first time it was alleged or contended that the injury inflicted by defendant's servants was the primal cause of his sexual debility, the defendant could well object to the plaintiff being permitted to enhance his damages on that score on the ground of surprise.

It would be equally logical and far more probable for a plaintiff suing for an assault committed by striking him on the head to attempt to recover damages for insanity produced by the blow, upon a declaration counting only on general damages, than it would be to recover damages for loss of marriage under the declaration in the case at bar; and yet where can the lawyer be found who would be bold enough to assert as a legal proposition that in the case given by way of illustration damages for dethronement of reason could be recovered under a pleading framed similar to the one under consideration.

In the language of Judge Ellsworth in Bristol &c. vs. Gridley, the physical pain and suffering more or less which every gunshot wound necessarily produces, the defendant knew or was bound to know that "they must exist of course," and that the plaintiff would offer proof thereof "on trial;" but "loss of marriage and the like" as a super-added consequence of the injury, the defendant was not presumed to know or anticipate. In the light of all the adjudged cases we ask this Court in all candor "Was it not gross error in "the trial Court to instruct the jury that they could award "damages to compensate him (plaintiff) for the deprivation "which he may suffer in loss of any comforts of marriage "and the power to have offspring."

The judgment should be reversed and the cause remanded.

JOHN M. WALDRON AND
EDWARD O. WOLCOTT,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1886.—No. 290.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Plaintiff in Error,

vs.

JAMES HARRIS,
Defendant in Error.

FURTHER BRIEF FOR PLAINTIFF IN ERROR.

The Plaintiff's Case.

1. *The Declaration:*

"For that whereas, on the 11th of June, 1879, on the line of railroad known as the Denver and Rio Grande Railway, while the plaintiff was lawfully in the employ of the Atchison, Topeka and Santa Fe Railroad Company as a watchman, and as such was lawfully upon the said railway, to wit, in a hand car, propelled and running thereon, the said defendant, by means of its servants and agents, unlawfully and wrongfully made an assault upon the said plaintiff, and shot and discharged divers rifles, guns, pistols and other fire-

arms, aimed and held at and against the said plaintiff, and thereby then and with shot, to wit, a leaden bullet, struck and wounded the said plaintiff in so grievous a manner that his life was by means thereof greatly despaired of," &c.

2. *The Plaintiff's Evidence:*

On the 10th of June, 1879, I was employed by the A., T. & S. F. as watchman from the 6th of April of the same year. I received an injury about that time. I was called on, I and a party of twelve men from El Moro, to meet the officials of the Santa Fe to escort them over the mountain to Fort Garland. They were going over to attend court. We waited at Fort Garland until the return of the officer from San Luis, when we came back to Cucharas. They left us there and took the train on to Denver. That was about the 8th of June. The next morning I was sent to El Moro to get some Winchester rifles from the agent there to arm us along with the pistols we had for our party at Cucharas. They expected trouble between the A., T. & S. F. and the D. & R. G. On the evening of the 10th or 11th, about eleven o'clock in the night, I heard a train or an engine coming. I woke the man who was in charge of our party and told him there was a train coming. He asked me in what direction it was coming, and I told him El Moro. He got up and took his lantern in one hand and his rifle in the other, and told me to stick a red light in front of the depot. He started on down the track, and in about ten or fifteen minutes I saw him climbing up from the track on the coal shaft, and just as he got up there some one hollered "Throw up your hands, you son-of-a-bitch." I told the boys who were with me—I says, "Get yourselves ready, fellows," and I started to put the lantern in front of the depot. Just as I did so,

they commenced firing at me * * * * when I got to the door they quit firing. I told the boys to come and help me fix some small sticks out of the door to make a bulwarks outside of the depot. Just at the time we had the sticks in position, I saw some one slipping up the track. I could not tell who they were as it was dark, and I says, "Who comes there." In place of answering, they commenced firing on us, and I gave the order to the other boys to return the fire. We kept up the firing for ten or fifteen minutes. * * * * The crowd withdrew, and turned around on the Y, laying off to Alamoso. We did not know what they were doing until the engine blew her whistle. She started down on the dead jump. I said, "Boys, they have gone for reinforcements, and it won't do to take any chances, and stay here until they come back." We put on two hand cars, it was about one o'clock at night, and started towards Pueblo. We had gone about a mile and a half to the first cut, north of Cucharas. Just after running through this cut, we ran on to a body of men, who were scattered across it. When we struck this force there were five of us on the first car, and six on the rear car. I was standing on the right hand side of the car, between two levers, passing this party. Just as we came up to them, they turned loose on us a volley of shots, and I was hit by that volley, and the man who was standing in front of me and I fell off to the right. I said to the rest of the boys, "You had better quit firing, boys; there is a train coming in front, and I guess they have got more men." The engine I saw come moving up towards us, and I thought I knew the crowd that was on the train, and holloaed, saying, "Is Ben Smith on that train?" "No; Ben Smith is not here, but Captain Anderson is." The affair occurred in Huerfano County. The party was in charge of Captain William Anderson. It was not under the charge of the Sheriff of Huerfano County,

that I know of. I did not know the Sheriff, and do not know that he was not there that night. I do not know that he was not in charge of the party, only Captain Anderson required me to surrender my arms.

The Plaintiff's Witnesses:

Late in the Winter of 1878, the A., T. & S. F. came into peaceable possession of the D. & R. G. Railroad. One of their first acts was to make almost an entire change of their employes. There was hard feelings created at once on the part of the recent employes of the D. & R. G. The thing came to a focus early in June, 1879.

The defendant did not introduce any evidence.

Further Assignments of Error.

1. The Court erred in charging the jury as follows: "If you believe from the evidence that the Denver and Rio Grande Railroad employed the men who fired upon and wounded the defendant, and instructed them to use violence against the employes of the Atchison, Topeka and Santa Fe road, and also find that the men so employed did shoot and wound this plaintiff, in obedience to the orders and under the direction of the officers and agents of the Denver and Rio Grande R.R., they must find a verdict for plaintiff"; such instruction having been duly excepted to (Record, p. 17 and 18).

2. The Court erred in overruling and denying the motion in arrest of judgment, made immediately on the rendition of the verdict (Record, p. 4), founded upon the ground alleged that the evidence in said cause introduced on behalf of said plaintiff does not tend to prove the allegations of said

declaration; and to which action of the court an exception was duly taken (Record, p. 21.)

The Functions of a Writ of Error.

"A writ of error always brings up to the superior court the whole record of the proceedings in the court below" (Dred Scott *vs.* Sanford, 19 How., 403).

"But the present case being brought here on a writ of error, the whole record is under the consideration of the Court" (U. S. Bank *vs.* Smith, 11 Wheat., 173).

"There can be no doubt that anything appearing upon the record which would have been fatal upon a motion in arrest of judgment is equally fatal upon a writ of error" (MARSHALL, C. J., in Slacum *vs.* Pomery, 6 Cranch., 221).

"The Judges are in contemplation of law bound, before in any case they give judgment, to examine the whole record, and then to adjudge either for the plaintiff or defendant according to the legal right as it may on the whole appear, notwithstanding or without regard to the issue in law, or any fact that may have been raised and decided between the parties. Therefore, whenever, upon an examination of the whole record, right appears upon the whole not to have been done, and judgment appears to have been given for one of the parties when it should have been given for the other, this will be error in law. Upon error in law, the remedy is by a writ of error requiring the record to be sent into the other court of Appellate jurisdiction, that the error may be corrected" (Stephen on Pleading, 120–121).

The Judicial Inquiry Involved.

The evidence which was before the Court and jury at the time the charge was delivered, and which constituted a part of the record when the motion in arrest was made, did

not disclose a case which in law supported the declaration, or entitled the plaintiff to recover.

The declaration is in trespass. It is so identified, first, because it uses the test words "force and arms," which are the translation of the original and characteristic words, "*vi et armis*," and, secondly, because it avers that the defendant "unlawfully and wrongfully made an assault and beat, bruised and wounded," which in legal effect is adding the words "*et contra pacem*," which further distinguish and identify the action of trespass.

COMYN (Action, m 2, note 2, p. 237) says:

> "Where a proceeding, which is injurious to another, has been attended with a violation of that state of peace and repose in which the law seeks to continue society at large, and individually the persons and possessions of all (as where A. has beaten the domestic of B., that a loss of service is the consequence), here is a wrong of both a civil and criminal nature. * * * * At the common law, upon those writs in which the words *vi et armis et contra pacem* were inserted, a capias issued to seize the defendant's person, as was mentioned in a note before, and when the plaintiff had recovered judgment, another capias, *pro fine*, was awarded at the suit of the crown in the first instance, and the fine or penalty was afterwards assessed by the Court, so that the defendant was sure upon these writs of being cast into prison."

The plaintiff's declaration thereof is of a criminal assault with a deadly weapon, with intent to kill. The Criminal Code of Colorado, within which the assault took place, contains these provisions:

> "§ 19. Murder is the unlawful killing of a human being with malice aforethought, either express or implied.
>
> § 20. Express malice is the deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

§ 53. An assault with intent to commit murder shall subject the offender to confinement in the penitentiary for a term of not less than one year nor more than fourteen years.

§ 137. If two or more persons meet to do an unlawful act upon a common cause of quarrel, and make advances towards it, they shall be guilty of a rout, and on conviction shall be severally fined in a sum not exceeding seventy dollars, or imprisoned in the county jail not exceeding four months.

§ 183. If any person shall have upon him any pistol, gun, or other offensive weapon, with intent to assault any person, every such person, on conviction, shall be fined in any sum not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months."

It appears from the plaintiff's evidence:

1. That he criminally armed himself.

2. That being so armed, he voluntarily, and in his individual capacity, and not as a "watchman," went out to meet those similarly armed, upon a common cause of quarrel, and with intent to kill them if he could—"I gave the order to the other boys to return the fire; we kept up the firing for ten or fifteen minutes. I said to the rest of the boys "you had better quit firing, boys; there is a train coming in front and I guess they have got more men" (Record, p. 12)—and

3. That in the "rout" so occasioned he was shot.

The judicial inquiry, therefore, is, whether, when such circumstances are proved by the plaintiff as his case, he has any legal cause of action against the person by whom he was shot, and whether the evidence adduced supported the declaration, which purported to set forth a good cause of action in trespass.

Argument.

Under the given circumstances, the precepts and maxims of the higher, civil and common law are adverse to the acknowledgment of any right of action on the part of the joint and criminal wrong-doer, for, as was said in Rex *vs.* Billingham (2 C. & P., 234), where the prisoners were indicted for a riot: "By law whatever is done in such an assembly by one, all present are equally liable for."

For centuries the former law has declared that "they who take the sword, shall perish with the sword," and it would be new in principle to hold that, because the "perishing" was incomplete, a cause of action accrued. Though it is not a conclusive objection that an action be new in the instance, it is a persuasive argument against its maintenance that, in the multiform complexity of human concerns, no similar action has been maintained. "If a case in law have no cousin or brother, it is a sure sign that it is illegitimate" (Ld. Bacon, Spedding's Ed., v. 7, p. 607). It is not believed that any case can be found in which one injured in a duel has been allowed to recover therefor from his antagonist, or in which, when one went out avowedly to murder some one, and has been injured before the homicide was effected, he has been allowed to recover. The going out of A. with intent to shoot B., and B.'s shooting A. after A. has discharged his gun, does not seem from the reports as yet to give a cause of action to A. Even if B. were indictable by the commonwealth, that would not demonstrate his civil liability to one in *pari delicto*, for the general rule would seem to be as stated by Lord LYNDHURST in Moriarty *vs.* Brooks (6 C. & P., 685): "If a person comes up to attack me, and I put myself in a fighting attitude to defend myself, this is not an assault on my part." Nor in this connection is it a matter of moment that the person who discharged the gun might have been personally a trespasser, for as was said in McEvoy *vs.* Drogheda (16 Weekly R., 34): "As against every person but the lawful owner of land a

person in occupation thereof as a mere trespasser has all the rights of a lawful owner."

Adams *vs.* Waggoner (33 Ind., 531), Bell *vs.* Hansley (3 Jones, 131) and other similar cases do not conclude the question which arises on the case, as made by the plaintiff and not by way of evidence for the defense, nor affirmatively settle the law that the given case is not concluded by the application thereto of well settled precepts and maxims of the civil and common law. Among these precepts and maxims are the following:

Consentio et agento pari paena plectentur (5 Rep., 80).

In pari delicto potior est conditio defendentis, which is a maxim of public policy equally respected in courts of law and equity (Taylor *vs.* Chester, L. R., 4, Q. B., 309). So STORY (Eq. Jur., § 298) says: "In general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law as to participators in a common crime, will not at present interpose to grant any relief, acting upon the known maxim *in pari delicto*," &c. This is sustained by the language of Lord MANSFIELD in Bromley *vs.* Smith (Doug., 697, note): "If the act is itself immoral, or a violation of the general laws of public policy, * * for where both parties are equally criminal against such general laws the rule is *potior est*" &c.; and the same maxim prevents any recovery for contribution by one of several joint wrongdoers against another (Broom's Leg. Max., 728).

So in Colburn *vs.* Patmore (1 C. M. & R., 83) the Court said: "I know of no case in which a person, who has committed an act declared by law to be criminal, has been permitted to recover compensation against a person who acted jointly with him in the commission of the crime. It is not necessary to give any opinion upon this point, but I may say that I entertain little doubt that a person who is declared by law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission."

Ex turpi causa non oritur actio.
Volenti non fit injuria.
Consent is a perfect shield in civil injury.

Thus in Fivas *vs.* Nicholls (2 C. B., 501 *et seq.*), which was an action brought for an alleged conspiracy between the defendant and one C. to obtain payment of a bill of exchange, accepted by the plaintiff in consideration that B. would cease from prosecuting C. for a crime, it was held that the action would not lie, inasmuch as it sprang out of an illegal transaction in which both the plaintiff and defendant had been engaged, and of which proof was essential to establish the plaintiff's claim.

In Holman *vs.* Johnson (Cowp., 343) it was said: "The principle of public policy is this, *ex dolo*, &c. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act," and what is illegality was stated in Degroot *vs.* Van Duzer (20 Wend., 290) to be, "the intention to aid in a violation of the law."

So also it was said in Lowell *vs.* Boston R.R. Co. (23 Pick., 32) that the general rule of law is that where two parties participate in the commission of a criminal act, and one party suffers damages thereby, he is not entitled to indemnity or contribution from the other party. So also is the rule of the civil law, *nemo ex delicto consequi potest actionem*."

Here the plaintiff and the man who shot him were, upon the plaintiff's evidence, jointly engaged in an attempt to commit the murder of whomsoever they might shoot, and the crime was none the less joint because each proposed to shoot the members of the opposing party, and not their friends.

Again. He who voluntarily fires upon an opposing party consents that such fire with all its consequences may be returned. Like a man who goes unnecessarily where he is advised that there are spring guns, he does so at his own peril.

In Ilott *vs.* Wilkes (3 B. & Ald., 185) the Court said: "If another takes upon himself to go into the wood, knowing that he is in the hazard of meeting with the injury which the guns are calculated to produce, it seems to me that he does it at his own peril, and must take the consequences of his own act. The maxim of the law, *volenti non fit injuria*, applies, for he voluntarily exposes himself to the mischief which happens."

In Stout *vs.* Wren (1 Hawks., 421), HALL, Judge, said: "Upon principle, unconnected with municipal law or policy, I doubt how far a person is entitled to recover damages after having agreed to take his chance in a combat, and after the event had proved the miscalculation he made upon his own strength; considering it merely as a violation of private right, I should say *volenti non fit injuria.*"

In Galbraith *vs.* Fleming (27 N. W. Rep., N. S., 581) the Court said: "The Court further instructed the jury that if the plaintiff voluntarily engaged in the fight in the first instance, for the sake of fighting, and not as a means of self-defense, he could not recover, unless the defendant beat him excessively or unreasonably. The law does not put a premium on fighting, and one who voluntarily enters into a quarrel will not be afforded relief for his own wrong in damages, if he comes out second best. While the voluntary act on the part of the plaintiff would not preclude the State from punishing him or the defendant for a breach of the peace, it nevertheless prevents him from bringing a civil action to recover compensation for injuries received by his own seeking, and in violation of law."

In Queen *vs.* Guthrie (L. R., 1 C. C. R., 243) the Court said: "If there is consent, there cannot be an assault."

In Queen *vs.* Coney (L. R., 8 Q. B. D., 553) the Court said: "As a general proposition, it is undoubtedly true that there can be no assault, unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no

assault at all. It may be that consent can in all cases be given so as to operate as a bar to a civil action, upon the ground that no man can claim damages for an act to which he himself was an assenting party. Though a man may by his consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the crown in the interests of the public for the maintenance of good order. He may compromise his own civil rights, but he cannot compromise the public interests."

To these cases may be added Champer *vs.* State (14 Ohio St., 437); Duncan *vs.* Com. (6 Dana, 295); and the general principle of criminal law as stated by DESTY (Cr. L., § 33) that "no act shall be deemed a crime if done with the consent of party injured;" and by MAY (Cr. L., § 56) that "there seems to be no warrant in the law for holding that one may be guilty of an assault by the application of force to another, to which the latter deliberately assents," and the language of the Court in Smith *vs.* State (12 Ohio St., 470), "an assault, therefore, upon a consenting party would seem to be a legal absurdity." If it be such a legal absurdity as prevents the State from prosecuting for a violation of the law, how is the absurdity lessened because the prosecutor says: "True, I consented, but now I am prosecuting civilly and not criminally." The effect of the assent does not arise, and certainly not in an action of trespass *contra pacem*, from the form of the action, but from the fact itself, and such effect as an estoppel is upon principle as effective *ad damnum* as it is against "the form of the statute in such case made and provided."

The ingenious device of defeating the effect of the assent by asserting that it is invalid, because the law does not permit an assent to be given to that which is criminal, was summarily and properly disposed of in State *vs.* Cooper (2 Zab., N. J., 53) in these words: "It was insisted upon the argument that the assent of the mother was null [to an attempt to procure abortion before she was quick with child]; that the offense was of so high a nature

that no assent of hers could purge the criminality. But this, it is obvious, is begging the question. The charge of assault against the person of the mother is clearly purged of criminality by her assent. The indictment is valid, but if, upon the trial, it appears that the means used to procure the abortion were used with the consent of the mother the defendant must be acquitted." Rightly, therefore, has an elementary writer said (19 Am. Law Rev., 852), "*volenti non fit injuria* is a maxim of the criminal as well as of the civil law," and it is insensate to suggest that the *volens* is inefficacious, because its subject matter is a crime, when by very reason of the *volens* such subject matter can never become a crime.

Reference may also be made to Reg *vs.* Meredith (8 C.& P., 589), where the prisoner was indicted for an assault with intent to commit rape, and for a common assault. The prosecutor stated that he abandoned the first count because he could not successfully contend that the girl had not consented, but, as she was between the ages of ten and twelve he should go upon the second count for the assault only. The counsel for the defendant said: "The consent puts the charge of assault out of the question." Lord ABINGER: "I think so. To support a charge of assault, you must show an assault which could not be justified if an action were brought for it, and leave and license pleaded," referring to PATTERSON, J., who had said (*ante*, p. 574): "I have grave difficulty in saying there was any assault because there was consent."

The suggestion that if A. goes out to murder B., and is shot by B., B. can maintain an action against A. for the assault, and A. can maintain an action against B. for having repelled the assault with an excess of force, does not seem as yet to have received the approbation of this Court, nor does it seem intrinsically to merit its commendation.

If, therefore, it appears from the plaintiff's case and by his evidence that he voluntarily armed himself, and, taking the law into his own hands, joined an illegal assembly for

the purpose, if necessary, of committing murder, and, in the course of the riot and rout, received a wound at the hands of those whom he had sought by violence to destroy, the law will not permit him to recover for an alleged assault, for it conclusively presumes his assent thereto, and will not permit him to recover through the medium and by the aid of an illegal transaction, to which he was himself a party, and which constitutes the foundation of his case.

Under such circumstances, the maxims "*Ex turpi*," "*In pari delicto*," and "consent is a perfect shield," apply, and are decisive of the case (Taylor *vs.* Chester, L. R., 4 Q. B., 314). If they are so decisive, then a charge which asserted an absolute right to recover and a ruling which refused to arrest the judgment because there was no evidence to support the declaration, were alike erroneous, and require a reversal of the judgment, as such charge and ruling were duly excepted to at the time.

Upon the exceptions to the admission of evidence as to facts and declarations both prior and subsequent to the injury, the case of Vicksburg *vs.* O'Brien (119 U. S., 99) is relevant upon the question of what evidence is so connected with the *res gestæ* as to be admissible; and the case of Moore *vs.* Arlam (2 Chitty Rep., 198) is relevant as to the evidence of the special damage, in which BAYLEY, J., stated the rule as follows: "The rule as to special damage is that you may give in evidence any special damage which is the clear and immediate result of the act complained of, but you cannot give in evidence as special damage any remote consequences." A supposed inability hereafter to procreate would seem to be rather a remote consequence from a gunshot wound in the hip, especially as the attempt does not appear to have been made, and before evidence thereof was admissible that result should have been pleaded as the clear and immediate result of the wound. It is not believed that the literature of the medical profession would afford any easily accessible precedent establishing that the

"swelling" and "wasting away" described on page 13 of the Record, and so strongly submitted in the charge were the "clear and immediate result" of a ball passing through the hip. But if it would, the defendant was entitled to notice in the declaration that that result would be proved as "a clear and immediate" one, so as to enable it to be prepared to meet the evidence adduced.

CHARLES M. DA COSTA,
CLARENCE A. SEWARD,
For Plaintiff in Error.

122-597

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES,

OCTOBER TERM, 1886.

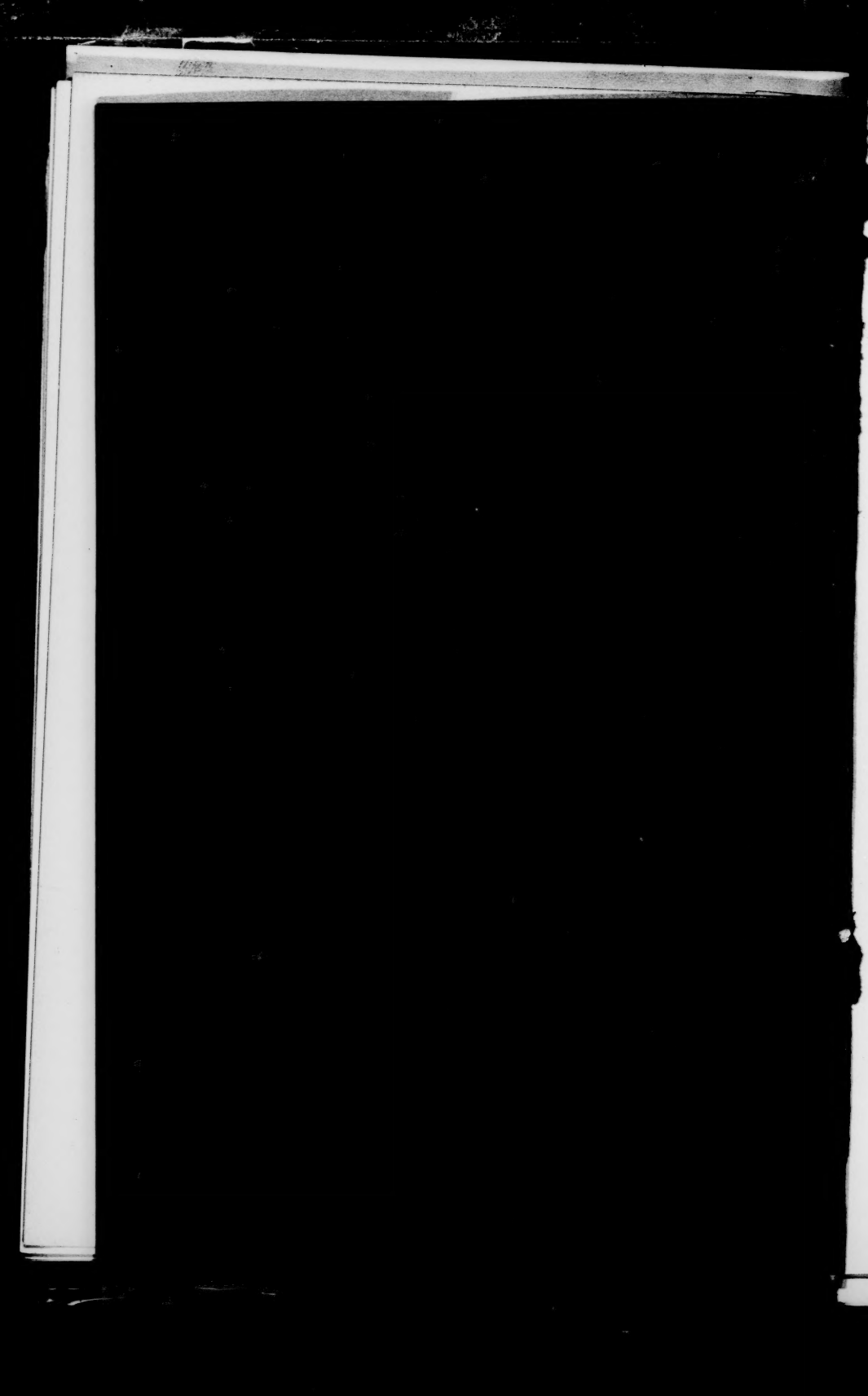
THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Plaintiff in Error.
vs.
JAMES HARRIS,
Defendant in Error.

No. 290.

BRIEF OF DEFENDANT IN ERROR.

JNO. H. KNAEBEL,
Of Counsel for Defendant in Error.

Santa Fe, N. M.



—IN THE—

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OCTOBER TERM, 1886.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Plaintiff in Error.
vs.
JAMES HARRIS,
Defendant in Error.

No. 290.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This is an action of trespass involving no points of law of serious difficulty, but founded on a tragic episode of the notorious "railroad war" in Colorado, which grew out of the effort of The Denver & Rio Grande Railway Company to regain possession of that

part of its railroad which it had leased to The Atchison Topeka & Santa Fe Railroad Company.

The declaration (*Transcript p. 1.*) is for assault and battery in the form given by Chitty. It avers that James Harris, plaintiff below, while engaged at Cucharas, Colorado, as a watchman of the Atchison, Topeka & Santa Fe Railroad Company, was assaulted and shot by the Denver & Rio Grande Railway Company (the plaintiff in error,) by its "servants and agents to that end incited, employed, instigated and directed by the said defendant," and was wounded &c., and "as a direct result of such shooting, wounding, wrong, and injury became and is permanently crippled."

The second count charges an assault and battery, in general terms, with *alia enormia*.

The damages claimed are $10,000.

The Railway Company, defendant below, at first interposed a demurrer to the declaration (*Ib.* p. 6.) on the grounds 1st, that the action should be case, instead of trespass; 2nd, that the assault was committed by agents and servants and not in course of their employment or for the benefit of the Railway Company; 3rd. that it did not appear that the Railway Company owed any duty to the plaintiff below, or that any "relation or connection existed between them;" 4th, that the acts charged appeared to be unlawful and willful acts of the person who committed the same, &c.; 5th, that the acts complained of were such as the Railway Company could

not do or authorize; 6th. "the declaration does not charge or show any neglect, want of kill or care on the part of the defendant's servants, or the unskillful or improper doing of any act which the defendant could lawfully do or direct or cause to be done" &c.; and 7th that the declaration "seeks to charge the defendant with the criminal acts of its servants committed against a stranger willfully and not in the course of their employment," and that "the acts complained of in said declaration, as therein stated, could not be charged to the defendant, even if expressly commanded and directed by its officers or its board of directors."

The grounds specified in the demurrer were the only ones which the Railway Company was entitled to have considered by the Court, under Rule 19 of the Territorial District Courts, which provides: "Every demurrer shall distinctly specify the grounds of objection to the pleading. Unless it do so, it may be disregarded. A demurrer may be taken to the whole pleading, or to any of the alleged causes of action or defense stated therein."

The demurrer was overruled and the Railway Company excepted (*Ib.* p. 7), but it afterwards elected to plead over, and interposed the plea of not guilty, upon which issue was duly joined (*Ib.* p. 3). Upon the trial of the issue thus joined, the jury found for the plaintiff below, in the sum of $9,000 damages, (*Ib.* p. 4).

The Railway Company thereupon interposed first a

motion for judgment *non obstante veredicto*, (126, fol. 44), second, a motion for a new trial, (*Ib.* fol. 45 &c.) and, thirdly, a motion in arrest of judgment, (*Ib.* fol. 48), each of which was overruled by the Court, (*Ib.* fol. 48).

Judgment upon the verdict having been duly entered, the Railway Company sued out a writ of error to the Territorial Supreme Court, and filed its assignment of errors, (*Ib.* fol. 52), complaining of the overruling of the demurrer and the said motions, and also complaining of the action of the District Court in giving certain instructions and refusing others, but failing to assign any errors in specific terms as to the admission of evidence, and merely complaining, in general terms, that the Court erred "in admitting improper, illegal and irrelevant evidence for the plaintiff, (def't. in error) on the trial of the case." (*Ib.* fol. 53).

The opinion of the Supreme Court of New Mexico in affirming the judgment, appears at fol. 75, &c., of the Transcript.

POINTS.

I. *The damages proved were the direct consequences of the injuries alleged.*

General damages are implied by law when an unlawful trespass is proved. The damages, $9,000, are within the amount, $10,000, for which judgment was claimed.

The declaration avers that the plaintiff below was

struck and wounded "in so grievous a manner that his life was by means thereof despaired of, and by reason of such wounding, the said plaintiff then and there became lame, sick, and disordered, and continued so lame, sick, and disordered for a long time, to-wit: from thence hitherto; and during all that time the said plaintiff thereby suffered great pains and was rendered incapable of following and transacting his necessary affairs and business by him during that time to be done, and, as a direct result of such shooting, wounding wrong, and injury, became and is *permanently crippled.*"

No objection whatever was taken at the trial, or urged in the Territorial Supreme Court, to any of the testimony as to the nature or extent of the injuries received by the plaintiff below, nor does the assignment of errors filed in this Court suggest any complaint respecting the evidence admitted on the question of damages.

As to the proof of impaired virility, *non constat*, but that that consequence of the injury was developed after the institution of the suit. The witness testified as to his condition at the time of the trial, (*Ib.* fol. 30).

Of course, the jury were bound to consider the whole damage, past, present, and future; but one recovery being permitted under the law.

II. The proofs of the plaintiff below were chiefly devoted to the maintenance of the two propositions essential to a recovery, that is,

1st. That the plaintiff was assaulted and wounded.

2nd. That the wrong was imputable to the Railway Company.

The *res gesta*, as to the trespass, was simple and easily proved. No question is raised by the plaintiff in error as to the sufficiency of the proofs on the subject.

But the *res gesta*, as to the general corporate scheme and its effectuation, involving the perpetration of the wrong complained of, was complicated, and embraced the whole story of the warlike campaign, upon which the Denver and Rio Grande Railway Company entered, against its rival, the Atchison Topeka and Santa Fe Railroad Company.

The plaintiff below had not access to the corporate books and private papers, nor to the corporate secrets locked up in the breasts of the corporate officers and agents. He was forced to prove by circumstances the participation of the corporation in the lawless proceedings which were the occasion of his injury. He showed to the Court that a line of railway, in the peaceable possession of the Atchison Topeka and Santa Fe Railroad Company, (Transcript, fol. 17), of which he was a watchman, was seized by hostile bands led by recognized officers of the Denver and Rio Grande Railway Company (*Ib.* fols. 17 to 24, inc.) armed and paid by that corporation, (*Ib.* fol. 20], that the Railway Company immediately accepted from the marauders the

railway which their strong hand had gained, [*Ib.* fol. 22], thus approving and ratifying the outrage, and that he was injured by the forces engaged in effecting this illegal seizure.

To portray this picture of a corporate raid, it was proper to show its inception and its incidents, as well as its triumphant conclusion.

The inceptive steps were the gathering of armed retainers by ex-Governor Hunt, Vice-President of the assailant corporation, (*Ib.* fol. 18) the distribution of Winchester rifles, procured at the corporate expense (*Ib.* fol. 20,) the payment of hirelings (*Ib.* fol 20,) and the attempt by the agent Anderson, one of the leaders, to bribe the trusted employés of the assailed corporation to violate their trust by surrendering their employer's property into the hands of their employer's enemy (*Ib.* fol. 31,) The incidents were the seizure by officials of the transgressing corporation of locomotives and cars out of the custody of the Atchison, Topeka & Santa Fe Railroad Company and filling them with armed men, and the subsequent acts of violence, including the murderous assault on the small party of railroad employes under charge of the plaintiff below (*Ib.* fol. 32, 33, 34.)

The conclusion was the successful consummation of the capture of the railway, in pursuance of the scheme and outrage which began with bribery in May (*Ib.* fol. 30,) took the form of open violence at El Moro and

H Very pertinent to this state of facts are the remarks of Mr. Justice Miller in Iron Mountain & Helena R.R. Co v Johnson 119 U.S. 615. 611. 612

Alamosa, (*Ib.* fol. 18,) in June, and ended at Denver in July.

The several parts of the testimony objected to by the Railway Company—the declarations of ex-Governor Hunt, its Vice-President, Capt. Anderson, and others, its agents, and allies, and all the various incidents of what may be properly termed a marauding campaign were all part of the connected story—the *res gesta*—of this corporate movement.

Such testimony made clear the intent with which the whole movement was inspired.

It pictured the mechanism of the wickedly contrived social machinery in whose clutches the plaintiff below was mangled.

The evidence disclosed a great conspiracy in which every participant was criminal, but a great conspiracy whose inspiring genius and contriver was a corporation, for whose profit and by means of whose resources, the crime was committed, and into whose greedy hands the spoils were delivered.

Suppose that an individual had organized a mob to take possession of a coveted railway property and, suppressing the evidence which might have directly shown his original participation in the scheme, kept in the back ground, and secretly furnished the means for its prosecution, and, finally, upon the violent seizure of the property, after weeks of lawless and turbulent proceedings by the mob, openly ac-

cepted from their hands the ravished railway and continued to enjoy it; can it be doubted but that his connection with the movement at its termination, might be shown as evidence to hold him responsible for all the antecedent proceedings of the mob?

The law makes no distinction among conspirators, based on the time at which they respectively joined the criminal combination during its activity in furtherance of its object. Each one that falls in becomes an increment of the criminal pool. One drop is not distinguishable from another in its waters.

Counsel for the plaintiff in error, in their exceptions and assignment of errors, have confused these two parallel propositions. Criticising evidence, because not applicable to the first *res gesta*, they fail to see that the evidence excepted to was properly applicable to the other *res gesta*.

While the *res gesta*, in one case, may be confined to the occurrences of a few minutes, the *res gesta*, in another case, as in a case of riot or overt treason, may be extended over weeks and months.

In the often cited case of Lord George Gordon, (21 Howell's State Trials, 486], the *res gesta* embraced many days and many places. The cries, devices, and overt deeds of the mob, at different times and places, were allowed to be proved.

While the immediate question related to what was done at London, on Friday the 2nd of June, 1780, the

Attorney General submitted to the Court, that "after the incitement we have proved, whether the business was all done on Saturday, or continued for several days, is evidence to be received—it was the same cry," [i. e. "No popery."] The Court ruled, "No doubt you are at liberty to give in evidence everything which shows that the mob so assembled on the 2nd of June, had a general intent, by terror and acts of violence, to force a repeal of the law. That does not affect the prisoner till you make him accessary and privy to it; but every circumstance that tends to show their intent you may give in evidence. If you give an overt act in the county in which it is laid, you may, to be sure, give evidence of an overt act in another county."

III. The defendant below resisted our demand, upon the theory that no corporation can be liable in trespass for assault and battery, and that, even if such liability be conceded, yet some business relation must be shown to exist between the corporation and the injured person, or else it must appear that the corporation, by resolution of its board of directors, or by some other equally formal mode, directly authorized the trespass.

It is well settled in this Court that corporate responsibility is the correlative of corporate power, and that a corporation whose force and funds are employed unlawfully to effectuate some corporate design, however illegal, is responsible forensically in as high a degree as the humblest citizen.

Salt Lake City. vs. Hollister, 118 U. S. 256.

Bat. & Potomac R. R. Co. vs. Fifth Bap. Ch. 108 U. S., p. 330.

National Bank. vs. Graham. 100 U. S., p. 702.

Merchants' Bank. vs. State Bank. 10 Wall. 604.

Phila. Wilm. & Balt. R. R. Co. vs. Quigley, 21 How 209.

Lynch. vs. Met. El. Ry. Co. 90 N. Y. 77.

Ramsden. vs. Boston & Albany R. R. Co. 104 Mass. 117.

Frost vs. Domestic Sewing M. Co. 133 Mass. 563

C. & A. R. R. Co. vs. Dalby. 19 Ill. 353.

C. & N. W. Ry. Co. vs. Peacock. 48 Ill. 253.

Eastern Counties Ry. Co. vs. Broom, 6 Exch. R. 314. (Wels. H. & G.)

Pennsylvania R. R. Co. vs Vandiver, 42 Pa. St. 365.

2 Wood's Ry. Law, 1374.

IV. As to the form of the action, it seems to follow from the very reasoning which establishes corporate liability in such cases, that the form should be according to the nature of the wrong imputed.

The injuries complained of resulted from a direct, wilful and wanton assault and battery—a trespass. It being true that a corporation, equally with an individual, may be held liable for such a trespass, no reason can be shown why the same form of action should not be used in the one case as well as in the other. In

harmony with this proposition, the great weight of authority fully sustains the form of action in this case.

V. Not standing on its demurrer, the plaintiff in error has waived the right of merely technical criticism of the declaration.

The demurrer has ceased to be a part of the record.

Campbell. vs. Wilcox. 10 Wall. 421, 423.

Young vs. Martin. 8 Wall. 354, 357.

Stanton. vs. Embrey. 93 U. S. 548.

VI. The exceptions to the instructions of the Court and to its refusal of certain requests to charge are altogether too broad to be available in this Court, (*Ib.* fol. 42). The exceptions are, in effect, a mere general complaint against each and every proposition charged or refused.

Worthington v Mason 101 U.S. 149. Beaver v Taylor 93 U.S. pp. 46.55 So in New Mexico

Lincoln. vs. Claflin. 7 Wall. 132.

Mobile & M. Ry. Co. vs. Jurey. 111 U. S. 584.

Caldwell. vs. Murphy, 11 N. Y. 416.

VII. If this court, notwithstanding the improper form of the exceptions, deems proper to consider the charge and instructions, it is submitted that the same are fully vindicated in the able opinion of the Territorial Supreme Court (*Ib.* fol. 75 &c.)

VIII. In the assignment of errors in this court, the only references to the instructions of the District Court (*Ib.* fols, 93, 94,) concern 1st. the refusal of the court to direct a verdict for the defendant below, which re-

fusal was manifestly proper; 2nd. the instruction that the damages were wholly within the discretion of the jury, which was equally proper; and 3rd. the instruction leaving it to the jury to consider as an element of damage the fact, if they found it, that the plaintiff below had been rendered impotent and, in considering that, to consider further the deprivation which he might suffer "in loss of any comforts of marriage and the power to have offspring."

It was proper to give this last instruction. It had no reference to any specific item of damage, but to such general loss, not of marriage, but of "any of the comforts of marriage," as well as of the power of procreation.

The common sense of the jury would naturally and properly have considered the same subject, without any instruction, just as, in case it had appeared that blindness had resulted from an injury to the head, the jury might have properly estimated damages for the deprivation of eye-sight.

The evidence on the subject went before the jury without objection; no motion to exclude it was made, nor any suggestion of surprise. The objection comes too late in this Court. Besides, the physical results may not have fully developed until after commencement of the action. As remarked by Chitty. (1 Ch. Pl. 397.) "Under this allegation of *alia enormia*, damages and matters which naturally arise from the act complained

of, or *can not with decency be stated*, may be given in evidence, in aggravation of damages, though not specified in any other part of the declaration."

IX. The trespass, being willful, wanton, and cruel, and manifesting extraordinary turpitude, exemplary damages were proper.

Day. vs. Woodworth, 13 How. 362.

Milwaukee, & St. Paul Ry. Co. vs. Arns. 91 U. S. 489.

Missouri Pac. Ry. Co. vs. Humes. 115 U. S. p. 521.

X. No evidence whatever was offered on the part of the defense. The Railway Company did not attempt to controvert or palliate the wrong imputed. As matter of law, upon the whole case, the plaintiff below was entitled to a verdict. The question of damages was the only question in the case.

While the declarations, *flagrante bello*, of each and all of the conspiring participants were competent, as tending to show the corporate enterprise, in its nature and extent, the admission of incompetent declarations on the same subject, would have worked no prejudice, since they would have been merely cumulative of facts otherwise established.

Cooper. vs. Coates. 21 Wall, 105.

Upon the whole, it is submitted that the plaintiff in error has suffered no substantial prejudice from anything here alleged as error. The extremely serious in-

jury suffered by the defendant in error, and the enormity of outrage attending its commission, suggest that the damages awarded are even less than justice might demand.

Decatur Bank, vs. St. Louis Bank, 21 Wall 294.
Walbrun. vs. Babbitt. 16 Wall, 577.
Marine Bank. vs. Fulton Bank. 2 Wall, 252.
Union Cons. S. M. Co. vs. Taylor. 100 U. S. 37.

The trial demonstrated the guilt of the Railway Company; and, it is submitted, the judgment should be affirmed with damages.

JNO. H. KNAEBEL,
Of Counsel for Defendant in Error.

Santa Fe, N. M.

The verdict of the jury ought not to be disturbed by this Court.
Lancaster v Collins. 115 U. S. pp 225. 227
Phoenix Ins Co. v Doster 106 U. S. 30
Manchester v. Ericsson 105 U. S. 347.
Moulor v Ins Co. 101 U. S. 708.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1269.

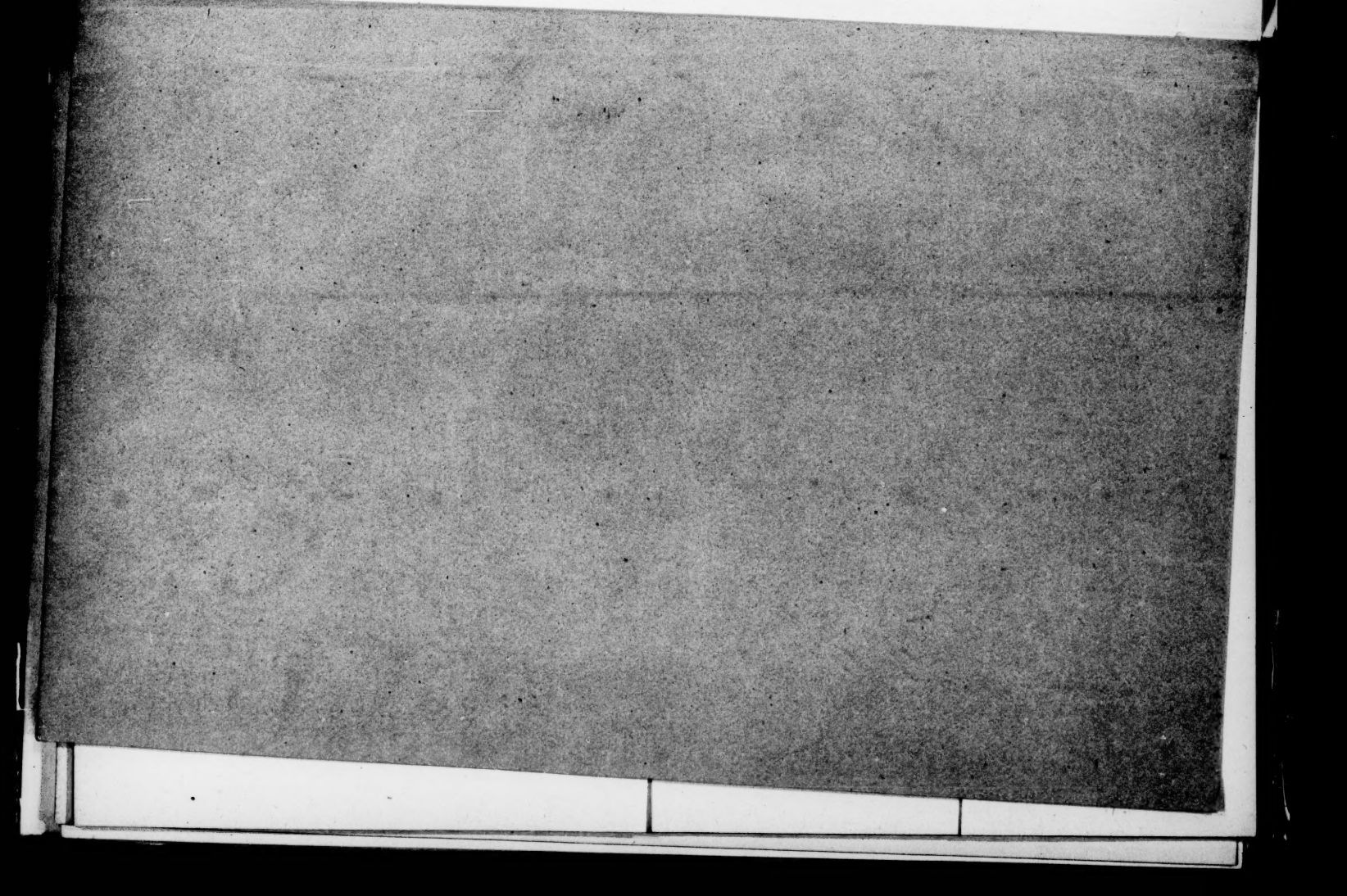
LEPINE C. RICE, ASSIGNEE OF ROBERT ERWIN AND CHARLES S. HARDEE, TRADING AS ERWIN AND HARDEE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 29, 1886.



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1 In the Court of Claims.

LEPINE C. RICE, ASSIGNEE OF ROBERT ERWIN and Charles S. Hardee, trading as Erwin and Hardee,
vs.
THE UNITED STATES.
No. 14781.

I.—*Petition.*—*Filed February* 17, 1886.

To the honorable the Court of Claims:

The claimant, Lepine C. Rice, a citizen of the United States, resident in the city of Savannah, in the State of Georgia, respectfully represents:

1. Under the provisions of the Revised Statutes of the United States, title Bankruptcy, he is the duly appointed and qualified assignee of Robert Erwin and Charles S. Hardee, late partners trading as Erwin & Hardee, in the said city of Savannah, as appears more fully from certified copies of the adjudication of bankruptcy, and of the order making his appointment, herewith filed, marked, respectively, Claimant's Exhibit, L. C. R. No. 1, and L. C. R. No. 2, and as such assignee he now brings this suit for the benefit of the trust so reposed in him.

2. The said Robert Erwin, then a citizen of the State of Georgia, on the 21st day of December, 1864, was the exclusive owner, in his own right, of two hundred and eighty-three (283) bales of upland cotton stored in the said city of Savannah, which on or about that day was seized and captured
2 by persons duly authorized and acting in behalf of the United States, and the proceeds of the sale made thereof, amounting, as is believed and it is here charged, to the net sum of forty-nine thousand six hundred and eighteen dollars and thirty-nine cents ($49,618.39), were paid into the Treasury of the United States, pursuant to the provisions of the act of Congress, approved March 12, 1863, ch. 120, commonly called the captured and abandoned property act.

And on or about the 1st day of July, 1865, he was also the owner exclusively and in his own right, of another lot of two hundred and sixty-one (261) bales of sea-island cotton then stored at and in the warehouse of Evans & Parnell, in the town of Thomasville, in said State of Georgia, which on or about that day was also so seized and captured by persons duly authorized and acting in behalf of the United States, was removed to and stored at the "Government cotton press" in the city of Savannah, where it remained in the custody of said agents of the United States until in the month of August following, when it was by them forwarded, upon the schooner Enchantress, to Simeon Draper, the United States Treasury agent in the city of New York, by whom it was subsequently sold for the account of the United States, and the proceeds thereof, amounting, as is believed, and it is here charged, to the net sum of one hundred and nineteen thousand eight hundred and fifty-seven dollars and thirty-four cents ($119,857.34), were duly accounted for by said Simeon Draper, and were paid into the Treasury of the United States in conformity with the said captured and abandoned property act.

3. On the 31st day of December, 1868, the firm of Erwin & Hardee, of which said Robert Erwin was a member, filed their petition in bankruptcy

under the provisions of the acts of Congress relating thereto, in pursuance of which, on the 15th day of January, 1869, they were duly adjudged bankrupts, as more fully appears in Exhibit L. C. R. No. 1.

3 And in the proceedings had in such bankruptcy one Robert H. Footman was appointed and qualified as assignee of said Erwin & Hardee, and proceeded in the administration of the trust until February 23d, 1877, when, upon his resignation thereof, your petitioner, the claimant, as appears more fully from Exhibit L. C. R. No. 2, was appointed to succeed him, and was duly qualified as assignee of said bankrupts; and the claimant now avers that under and in virtue of the assignment in bankruptcy of the property and estates of said Erwin & Hardee and each of them, and of the proceedings had in the court in that regard, the claims of said Erwin, hereinbefore mentioned, against the United States, and for which this suit is prosecuted, became and now are vested in the claimant, who is now duly qualified and acting as assignee of said bankrupt as is hereinbefore alleged.

4. Inasmuch as the right of said Erwin to maintain the action provided in the said captured and abandoned property act for and upon the said claims was barred by the limitation of suits under said statute, a special act of Congress was passed and became a law as of and on the 5th day of February, 1877, the same being entitled "An act for the relief of Robert Erwin," being found in 19 Stat. L., p. 509, which enacts and reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims may take jurisdiction under the provisions of the act of March twelfth, eighteen hundred and sixty-three, entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' of the claims of Robert Erwin, of Savannah, Georgia, for property alleged to have been taken from him, which claims were by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act."

4 5. The claimant now avers that under and because of said last-recited act of Congress jurisdiction was given anew to this court to hear and determine the said claims of the said Erwin in the manner and by the proceedings provided in the captured and abandoned property act. But at the time of the enactment of said law all the property and rights of said Erwinwhich existed on the 31st day of December, 1868, had vested, as aforesaid, in his assignee in bankruptcy; and the said claims, then and now, were and are assets of the estate of said Erwin in bankruptcy, for which the claimant alone as such assignee could, or now can, maintain the proceedings prescribed by said captured and abandoned property act, and under and in virtue of the said special and enabling act hereinbefore recited. And he now comes and brings this suit in pursuance thereof.

6. He further avers and charges that the said cotton was never abandoned nor condemned as forfeited to the United States; but that the said United States retains the net proceeds thereof only as trustees for the owner thereof; and in and by the said private act, as herein recited, it has recognized the claimant's right to the proceeds thereof, upon the preferment of

his claim in conformity with the provisions of the said captured and abandoned property act.

7. He further avers that, except the assignment made as required by the bankrupt act, no assignment has been made at any time of the said claims or either of them, or of any part of them or either of them, but the same remain as assets of the said bankrupt estate; and he now claims payment thereof for the benefit of the said estate; and as such assignee he charges that he is justly entitled to have and receive the amounts herein claimed from the moneys in the Treasury of the United States, so held in trust for the benefit of those who shall establish their claim to it under the provisions of the captured and abandoned property act.

He therefore prays for judgment against the United States for the proceeds of the said cotton, so as aforesaid seized for and under the authority of the said United States, of which at the time of its seizure the said Robert Erwin was sole owner, and which was so sold, and the net proceeds of which, amounting in the aggregate to the sum of one hundred and sixty-nine thousand four hundred and seventy-five dollars and seventy-three cents ($169,475.73), have been paid into the Treasury, and now remain there as a part of the fund arising under said act.

ALBERT SMALL,
Attorney and Solicitor for Claimant.
SHELLABARGER & WILSON,
Of Counsel.

DISTRICT OF COLUMBIA,
City of Washington, sct.:

Albert Small, being duly sworn, on oath says that he is the attorney in fact of the claimant in this cause in virtue of a letter of attorney herewith filed, dated February 13th, 1886; that no assignment or transfer of the claims set forth in the aforegoing petition, or any part thereof, or of any interest therein, has been made, except as is shown in the petition; that he believes the claimant is justly entitled to the amount claimed—and as it is claimed—from the United States, after allowing all just credits; and that the matters and facts therein stated are true, to the best of his knowledge, information, and belief.

Sworn to and subscribed before me this 17th day of February, 1886.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

Post-office address of claimant's attorney, Hagerstown, Maryland.

Exhibit L. C. R. No. 1 *to petition.—Filed February* 17, 1886.

UNITED STATES OF AMERICA,
Eastern Division, Southern District of Georgia, ss:

I, Marion Erwin, clerk of the district court of the United States of America for the southern district of Georgia, do hereby certify that the writing annexed to this certificate is a true copy of its respective original on file and remaining of record in my office, to wit:

In the matter of Erwin and Hardee, b'k'pts, adjudication of bankruptcy on debtors' petition.

In witness whereof I have caused the seal of the said court to be hereunto affixed, at the city of Savannah, in the southern district of Georgia, this ninth day of February, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

[SEAL.] MARION ERWIN,
Clerk.

7 *Adjudication of bankruptcy on debtors' petition.*

In the district court of the United States for the southern district of Georgia.

In the matter of Robert Erwin & Charles S. Hardee, composing the firm of Erwin and Hardee, by whom a petition for adjudication of bankruptcy was filed on the thirty-first day of December, A. D. 1868. } In bankruptcy.

At Savannah, in said district, on the fifteenth day of January, A. D. 1869, before Frank S. Hesseltine, one of the registers of said court in bankruptcy.

SOUTHERN DISTRICT OF GEORGIA, *ss:*

I, the undersigned, a register of said court in bankruptcy, upon good proof before me taken, do find that the said Robert Erwin and Charles S. Hardee have become bankrupts within the true intent and meaning of the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and I do hereby declare and adjudge them bankrupt.

FRANK S. HESSELTINE,
Register in Bankruptcy.

8 *Exhibit L. C. R. No. 2 to petition.—Filed February 17, 1886.*

UNITED STATES OF AMERICA,
Eastern Division, Southern District of Georgia, ss:

I, Marion Erwin, clerk of the district court of the United States of America for the southern district of Georgia, do hereby certify that the writing annexed to this certificate is a true copy of its respective original on file, and remaining of record in my office, to wit, order accepting resignation of R. H. Footman, assignee of Erwin and Hardee, and order appointing Lepine C. Rice, assignee, vice R. H. Footman, resigned. In re Erwin and Hardee, bankrupts.

In witness whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Savannah, in the southern district of Georgia, this 2d day of February, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundredth and tenth.

[SEAL.] MARION ERWIN, *Clerk.*

9 In the district court of the United States for the southern district of Georgia.

In the matter of Robert Erwin and Charles S. Hardee, bankrupts.

Robert H. Footman having tendered his resignation as assignee of said bankrupts, it is ordered by the court that his resignation be, and the same is hereby, accepted.

It is further ordered that Lepine C. Rice, of the city of Savannah, in said district, be, and he is hereby, appointed assignee of said Robert Erwin and Charles S. Hardee, to succeed said Robert H. Footman.

It is further ordered that the register in charge of said matter furnish the assignee now appointed with copies of the schedule of said bankrupts, and that the late assignee transfer to said Lepine C. Rice all the books, papers, moneys, and other property, real and personal, and choses in action of said bankrupts, or either of them, now in his possession or under his control, and that he furnish to the register a full statement showing his actings and doings as such assignee and the disposition made of the
10 bankrupts' assets not in his possession, together with all vouchers and memoranda belonging or appertaining to his said office of assignee.

Febr'y 23, 1877.

JOHN ERSKINE,
U. S. Judge.

11, 12 II.—*Motion of defendants to dismiss case for want of jurisdiction.—Filed April* 19, 1886.

And now comes the Attorney-General and moves this honorable court to dismiss this case and the petition filed herein for want of jurisdiction to hear and determine the same.

ROBERT A. HOWARD,
Asst. Attorney-General.

III.—*Demurrer.—Filed April* 19, 1886.

And now come the said defendants by their Attorney-General, and demurring to the petition in this cause, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

ROBERT A. HOWARD,
Asst. Att'y-General.

13 IV.—*Argument and submission of case on motion to dismiss and on demurrer.*

On the sixth day of May, A. D. 1886, Mr. May for the defendants was heard in support of the demurrer, and motion to dismiss filed herein, and on the tenth day of May, A. D. 1886, Mr. Small and Mr. Shellabarger were heard in opposition thereto, and Mr. May closed in their support, and said motion and demurrer were submitted.

14 V.—*Opinion of the court.*

RICHARDSON, Ch. J., delivered the opinion of the court:

This action is brought by the assignee of Robert Erwin, under the provisions of the following act of Congress (19 Stat. L., 509), which became a law February 5, 1877, without the President's approval:

AN ACT for the relief of Robert Erwin.

"*Be it enacted, &c.*, That the Court of Claims may take jurisdiction under the provisions of the act of March 12, 1863, entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," of the claims of Robert Erwin, of Savannah, Ga., for property alleged to have been taken from him, which claims were by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act."

The petition, which was filed February 17, 1886, alleges, as the cause of action, that—

'The said Robert Erwin, then a citizen of the State of Georgia, on the 21st day of December, 1864, was the exclusive owner, in his own right, of 283 bales of upland cotton, stored in the said city of Savannah, which, on or about that day, was seized and captured by persons duly authorized and acting in behalf of the United States; and the proceeds of the sale made thereof, amounting, as is believed and it is here charged, to the net sum of $49,618.39, were paid into the Treasury of the United States, pursuant to the provisions of the act of Congress, approved March 12, 1863, chapter 120, commonly called the captured and abandoned property act.

"And on or about the 1st day of July, 1865, he was also the owner exclusively, and in his own right, of another lot of 261 bales of sea-island cotton then stored at and in the warehouse of Evans & Parnell, in the town of Thomasville, in said State of Georgia, which, on or about that day, was also so seized and captured by persons duly authorized and acting in behalf of the United States, was removed to and stored at the Government cotton press in the city of Savannah, where it remained in the custody of said agents of the United States until in the month of August following, when it was by them forwarded, upon the schooner Enchantress, to Simeon Draper, the United States Treasury agent in the city of New York, by whom it was subsequently sold for the account of the United States, and the proceeds thereof, amounting, as is believed and it is here charged, to the net sum of $119,857.34, were duly accounted for by said Simeon Draper, and were paid into the Treasury of the United States in conformity with the said captured and abandoned property act.

"On the 31st day of December, 1868, the firm of Erwin & Hardee, of which said Robert Erwin was a member, filed their petition in bankruptcy under the provisions of the acts of Congress relating thereto, in pursuance of which, on the 15th of January, 1869, they were duly adjudged bankrupts.

"And in the proceedings had in such bankruptcy one Robert H. Footman was appointed and qualified as assignee of said Erwin & Hardee, and proceeded in the administration of the trust until February 23, 1877, when,

upon his resignation thereof, your petitioner, the claimant, was appointed to succeed him, and was duly qualified as assignee of said bankrupts; and the claimant now avers that under and in virtue of the assignment in bankruptcy of the property and estates of said Erwin & Hardee, and each of them, and of the proceedings had in the court in that regard, the claims of said Erwin, hereinbefore mentioned, against the United States, and for which this suit is prosecuted, became and now are vested in the claimant, who is now duly qualified and acting as assignee of said bankrupt as is hereinbefore alleged."

15 The defendants file a motion to dismiss for want of jurisdiction, and also a general demurrer, under each of which three objections are raised against the claimant's petition—

(1) It is argued that the act under which the suit is brought was, in the words of the title, "for the relief of Robert Erwin," and not for his creditors through the assignee in bankruptcy previously appointed, and that the latter acquired no rights thereby, both because the act was not intended for him (Strong v. Hopkins, 2 Paine, 584), and because the right to sue was a valuable right or privilege acquired after the appointment of the assignee, and did not pass by the assignment.

(2) It is also argued that an assignee in bankruptcy has no right to keep the estate open and bring actions nine years after his appointment. (Rev. Stat., sec. 5057; Baily v. Glover, 21 Wall., 346; Walker v. Towner, 4 Dillon, 165.)

We express no final opinion on these two points, although we are inclined to think that one of them, at least, is well taken. They merit serious consideration, and could not be passed by did we not prefer to rest our decision upon the third objection, which concerns more particularly the jurisdiction of this court. But they will be open to the defendants in the Supreme Court on appeal, if the case should go there.

(3) The third objection is that the claim, under the act of 1877, accrued more than six years before the filing of the petition, and so is forever barred by the following section of the Revised Statutes, which was held by the Supreme Court in Haycraft's case (22 Wall., 81, and 10 C. Cls., 108) to be jurisdictional.

"SEC. 1069. Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues.

"*Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

A claim first accrues, within the meaning of the statute, when a suit may first be brought upon it, and from that day the six years' limitation begins to run. Any suit under the act of February 5, 1877, might have been instituted by filing a petition within six years after that date. That

time has long since passed, and the present claimant has lost his rights thereunder, if he ever had any, unless his case is taken out of the operation of section 1069 of the Revised Statutes in either of two ways which his counsel present.

In his behalf it is insisted that the section applies only to claims which came under the general jurisdiction of the court before its enactment, and not to claims founded upon special acts subsequently passed We do not concur in this view. A similar doctrine in relation to the right of appeal under section 707 of the Revised Statutes was considered by the Supreme Court in Zellner's case (9 Wall., 244, and 7 C. Cls., 137). The court say:

"It is supposed, as the act concerning abandoned and captured property conferred upon the Court of Claims a new subject of jurisdiction in addition to those previously provided for, and at the same time made no provision for appeals to the Supreme Court from their judgments or
16 decrees, no right of appeal existed in respect to either party, and that the general provision in the fifth section of the act of March 3, 1863, reorganizing the court, and conferring what may be called its general jurisdiction, cannot be invoked in this case. We cannot agree to this view.

"The language of the section is general; 'Either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court.'

"This court was organized as a special judicial tribunal to hear and render judgment in cases between the citizen and the Government; the subjects of its jurisdiction were defined in the act, and generally the mode of conducting its proceedings, subject, of course, to such alterations and changes as Congress from time to time might see fit to make.

The subjects of its jurisdiction could be enlarged or diminished, but this would not disturb or in any way affect the general plan or system of its organization.

"If new or additional subjects of jurisdiction were conferred, the effect would be simply to increase the labors of the court, the case to be heard and determined under the existing organization."

In McKee's case (10 C. Cls., 208) the Supreme Court held expressly that "Section 707 of the Revised Statutes gives to the United States the right of appeal from the adverse judgments of the Court of Claims in all cases where that court is required by any general or special law to take jurisdiction of a claim made against the United States and act judicially in its determination." And the Supreme Court took jurisdiction of an appeal from this court upon a judgment rendered against Robert Erwin under this very act of 1877, although the only authority for it was found in section 707 of the Revised Statutes.

There is no distinction in principle between the application of the right of appeal under section 707, to special acts of legislation subsequently passed, and the application of the limitation of section 1069 to such cases.

The act of 1877 created a new and additional subject of jurisdiction and a new cause of action, by reviving an expired one, and in our opinion the general statute of limitation, as well as the general right of appeal, attaches and applies to it; just as when part payment on a promissory note takes a right of action thereon out of the statute, such right is not forever after relieved from all limitation, but the statute begins to run anew from the date of such payment.

It is now more than nine years since this court was opened anew to the rightful claimant, whoever he may be, under the act of 1877, and, according to the construction urged by the present claimant, it is never to be closed until he be found, and of his own motion comes in and files his petition, a construction which, in our opinion, is unreasonable and not to be adopted.

While Congress has declared a general limitation of six years for "every claim cognizable by the Court of Claims," and a still shorter one of two years, for claims under the captured or abandoned property act, it is unreasonable to infer that it intended to confer upon every claimant under the act of 1877—and the present one is the second who has appeared (Erwin's case, 13 C. Cls., 49, affirmed on appeal, 97 U. S., 392)—the unusual and extraordinary privilege accorded to no other citizen, of bringing an action against the Government at any future time without limitation. Such a construction would be in conflict with all idea of repose, which is said to be the object of statutes of limitation, and to the general policy of Congress in all other cases.

It was said in Clarke's case (11 C. Cls., 702), decided a year before the passage of the act of 1877 now under consideration: "It is not to be doubted that subsequent subjects of jurisdiction would be subject
17 to the provisions of the statute of limitation if they were in the nature of money demands against the Government." This was then and has ever since been the settled doctrine of this court, and we have no doubt Congress so understood it when the act of 1877 was passed.

That the present claim, under that act, is a money demand against the Government, and nothing else, we shall demonstrate beyond question, we are quite confident.

But the claimant argues that the property received and sold, and the proceeds thereof in the Treasury, under the peculiar legislation of the captured or abandoned property act of March 12, 1863 (12 Stat. L., 820), are trust funds, of which the defendants are merely trustees, and are subject to the rules and practice of courts of equity in relation to equitable trusts, one of which is, that statutes of limitation do not run as between trustee and cestui que trust.

Some dicta in early opinions of the Supreme Court arising under that act have no doubt led to an erroneous impression that this court is to administer cases under it as though they were causes in equity, subject to the law of equitable trusts as applied in courts having chancery jurisdiction. In Klein's Case (13 Wall., 128, and 7 C. Cls., 240), Chase, Chief Justice, in his opinion, said:

"The Government constituted itself the trustee for those who were by that act declared entitled to the proceeds of captured and abandoned property and for those whom it should thereafter recognize as entitled. * * * The property of the original owner is in no case absolutely divested. There is, as we have already observed, no confiscation, but the proceeds of the property have passed into the possession of the Government, and restoration of the property is pledged to none except to those who have continually adhered to the Government. Whether restoration will be made to others, or confiscation will be enforced, is left to be determined by considerations of public policy. * * * It was for the Government itself to determine whether these proceeds should be restored to the owner or not."

The doctrine now insisted upon as to trust and trusteeship is founded on that dicta. The case itself did not involve any consideration of the principles of equity as applied to trusts and to trustees, and it does not appear exactly what, if any, such principles the learned Chief Justice understood might be invoked in the execution of the statute. But he does say that it was for the Government itself to determine whether these proceeds should be restored to the owner or not.

While Mr. Chase was Secretary of the Treasury, and for some time afterwards, the money received from captured and abandoned property was merely deposited with the Treasurer, and was not technically, in departmental language, "covered into the Treasury," and so, according to the construction then given by the Department, was not subject to the constitutional provision that "no money shall be drawn from the Treasury but in consequence of appropriations made by law" (Const., art. 1, sec. 9, par. 7). More than two and a half million dollars of it was paid out by Secretaries Chase, Fessenden, and McCulloch (Hodges' Case, 18 C. Cls., 704), without any appropriation therefor, when Congress interposed and passed the joint resolution of March 30, 1868, No. 25 (15 Stat. L., 251).

That resolution required all moneys received from sales of captured and abandoned property to be paid into the Treasury of the United States, and they were thereupon "covered into the Treasury" and mingled with other public money. No account has since been kept of the same
18 as a separate fund, and as such they are not known except outside the Treasury Department. Receipts and expenditures are entered as in other cases, and the statements which, from time to time, have been made, by request, relating thereto have been taken from the scattered items of receipts and expenditures (Hodges' Case, 18 C. Cls., 700).

The permanent appropriation for the payment of judgments of this court in captured and abandoned property cases is not chargeable to any fund, but is payable "out of any moneys in the Treasury not otherwise appropriated." (Rev. Stat., sec. 3689.)

It is not at all improbable that this legislation, enacted after Secretary Chase had left the Department, escaped the observation of the Chief Justice when he wrote the dicta quoted from his opinion in Kline's case.

A trust in which the so-called trustee may legally mingle the trust money with his own, employ it for his own use, and himself determine whether he will forever retain it, or will give it to others, is a singular trust, unknown to law or equity, and to which no principles of equity jurisprudence can be found to apply.

It is a universal rule of equity that if a trustee mingles trust money with his own and uses it for his own benefit he shall account for or pay interest thereon to the cestui que trust. (Story's Equity, secs. 1277, 1277*a*; Perry on Trusts, sec. 468.)

But it is provided in Revised Statutes as follows:

"SEC. 1091. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

This court has always applied that section to cases under subsequently enacted special acts and to those under the captured or abandoned property act.

The claimant here might as well invoke the rule of equity as to interest and demand payment of interest on the money received for the cotton in question notwithstanding section 1091 of the Revised Statutes, as to invoke the equitable rule that statutes of limitation do not run in favor of trustees against the beneficiaries of the estate held by them.

But more recent decisions and the practice of this court and of the Supreme Court have swept away all such ideas of trust in connection with the property or money received under the captured or abandoned property act.

In Haycraft's Case (22 Wall., 94, 95, and 10 C. Cls., 110, 111, 112), the Supreme Court said, respecting captured and abandoned property, speaking by Chief-Justice Waite:

"The act of Congress looked to its preservation, but authorized its capture. In so doing Congress acted within its constitutional power to 'make regulations concerning captures on land and water.' (Art. 1, sec. 8, par. 11.) In the indiscriminate seizure which was likely to follow such an authority, it was anticipated that friends as well as foes might suffer. Therefore, to save friends, it was provided that any person claiming to have been the owner might, at any time within two years after the suppression of the rebellion, prefer his claim, and, upon proof of his ownership and loyalty, receive the money realized by the United States from the sale of the property.

"That expresses all there is of the trust or the remedy provided." * * * This certainly does not recognize much of a trust. It is no more so than is that upon which every person holds the property which is exclusively his own—to be managed as he sees fit and to be disposed of as he pleases. In such a trust, if that be not a misnomer, the special principles of equity do not apply and courts of equity do not interfere.

In Burke's Case (13 C. Cls., 231) this court, speaking by Judge Bancroft Davis, said:

"It is argued that this court sits as a court of equity in proceedings under the captured and abandoned property act, and that we must resort to equity to determine the status of this claimant. * * *

"An early attempt of this court to render judgment under the general act for specific performance (Alire's Case, 1 C. Cls., 233) was met by the Supreme Court by the remark that 'it is quite clear that the limited power to render a judgment confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the Government.' (Alire's Case, 6 Wall., 573.)

"Shortly afterward, the same court held that this court 'was authorized to enforce legal rights and obligations, but it could not proceed further and judge of the equities between a citizen and his government. * * * The Government has not thought fit to allow itself to be sued in the Court of Claims on equitable considerations.' (Bonner's Case, 9 Wall., 156.)

"About the same time, a question being raised concerning proceedings in cotton cases, the same court said 'no special proceedings are prescribed to the Court of Claims' by the captured and abandoned property act, but "they are to proceed in the usual way to hear and adjudicate upon the question of ownership and right to the proceeds according to the proofs and the law of the case.' (Zellner's Case 9, Wall., 244.)

"Nearly simultaneously with these proceedings, however, the Supreme Court, in casual expressions in two cases, referred to the United States as a trustee holding the proceeds of captured and abandoned property for the owner's benefit (Anderson's Case, 9 Wall., 56; Padelford's Case, 9 Wall., 531), which expressions were repeated in two subsequent cases. (Klein's Case, 13 Wall., 128; Intermingled Cotton Cases, 92 U. S. R., 651.) From these casual expresssions it is argued that we are passessed of the equity jurisdiction necessary to administer upon trusts, and that the Supreme Court was mistaken when it said that 'the Government has not thought fit to allow itself to be sued in the Court of Claims on equitable considerations.'

"That court, in calling the United States a trustee, may have referred to the large class of trusts cognizable at law. In its broad legal sense the word trust embraces many transactions and relations of business and property which are administered in courts of common law in States where two systems of jurisprudence and of remedies exist side by side. The familiar cases of bailments and of money had and received to the use of another are instances of such trusts.

"The court may well have compared the relations of the Government toward the fund in the Treasury to this class of trusts. It is less probable that it intended to convert those relations into an equitable trust, since the essential elements of personal confidence and trust reposed in the depositary by the creator of the trust are wholly wanting. The language of Chief-Justice Waite in Haycraft's Case, where he 'expresses all there is of the trust' (22 Wall., 94), warrants this conclusion.

"In administering upon the cotton cases this court has neither assumed to act as a court of equity nor as a court of dommon law, bat simply as the Court of Claims. Dicta of individual judges may afford ground for arguing in favor of equity jurisdiction in case of necessity, but no necessity for its exercise has yet arisen."

Moreover, if actions upon claims for the proceeds of property received under the provisions of the captured or abandoned property act were to be tried in equity, this court would have been relieved from making findings of fact in such cases, and the whole record, evidence and all, would be sent up to the Supreme Court on appeal (Hot Springs Cases, 10 C. Cls., 345; 92 U. S., 698, and 11 C. Cls., 238; Eastern Band of Cherokees Case, 20 C. Cls., 461, and 117 U. S., 288; McClure's Case, 116, U. S., 145.)

But this court and the Supreme Court have never so regarded them, and a finding of facts has been required and has been made in every case under the abandoned or captured property act, as in other actions at law, and not in equity. (See De Groot's Case, 5 Wall., 419, and 7 C. Cls., 2; McMahon's Case, 14 Wall., 109, and 7 C. Cls., 282; Pugh's Case, 99 U. S., 271.) Nor has there been a single case where, in this court or in the Supreme Court, the special and peculiar principles of equity jurisprudence have been applied.

The reason why the general statute of limitation did not apply to the captured and abandoned property act as originally enacted, was that the latter had a shorter limitation of its own, which took it out of, or was a limitation upon the general statute (Fendall's Case, 16 C. Cls., 120.) But the act of 1877, under which this suit is brought

20 has no special limitation of its own, and the reason wanting the exception fails. (Cess ante ratione legis cessat, ipsa lex.)

In Taylor's case (104 U. S., 216, 222) the Supreme Court called the United States trustees of the surplus money paid into the Treasury from the sales of lands for taxes under the direct tax acts (12 Stat. L., 292, 422, 640; 14 Stat. L., 568) over and above that which was required to pay the tax, interest, and costs. That court did not treat the case as one in equity, and upon a findings of fact by this court, as in cases at law, they held, as to the state of limitations, that "the right of the owner of the land to recover the money which the Government held for him as his trustee did not become a claim on which suit could be brought, and such as was cognizable by the Court of Claims, until demand therefor had been made at the Treasury. Upon such demand the claim first accrued," and the statute of limitation began to run. So in the present case, a suit cognizable by the Court of Claims could not have been brought after the limitation of the captured or abandoned property act had expired, until the passage of the act of 1877 specially authorizing it, and from that time the statute of limitation began to run and had run out long before the claimant came into court.

The petition is dismissed.

21 VI.—*Dissenting opinion.*

NOTT, J., delivered the following dissenting opinion:

The plain and simple question in this case is whether the statute of limitations (Rev. Stat., sec. 1069) applies to that subject of jurisdiction known as the captured property cases.

In Hayeraft's case (22 Wall. R., 81) the counsel for the claimant asked the same question, and the Supreme Court answered that it did not.

The argument which was addressed to the Supreme Court in that case will be found set forth (not in extenso) in 10 C. Cls. R., 95–104. It is an argument of extraordinary ingenuity, ability, learning, and earnestness. There have been several attempts since then to change the trust into implied contract, and to change the limited responsibility of the Government as a trustee into the more extended responsibility of a stakeholder or bailee, but every idea and argument and illustration which has been advanced will be found more fully and forcibly set set forth in the claimant's argument in Hayeraft.

The object of that argument was to establish the position that the holding of the Government was an implied trust and the character of the Government that of a stakeholder or bailee, as to which the law implies a contract to pay over the money to the rightful owner; and hence that the six years' statute of limitations was applicable to such cases. The Supreme Court answered that no implied contract existed; that the character of the Government was that of a trustee, and that such cases did not come within the statute of limitations.

The statute of limitations was made for the protection of the Government and is applicable to all cases where the Government has incurred a personal liability. The jurisdictional period of two years prescribed by the abandoned or captured property act (12 Stat. L., 820, sec. 3) was made for the protection of claimants and to enable them all to come before the court at the same time, to the end that each might defend his own share

of the fund from the adverse demands of adverse claimants. The two systems have been administered as distinct systems without one single exception until the present day; and how completely distinct they have been kept will be best understood from the following illustration:

The act 3d March, 1863 (12 Stat. L., p. 765), which reconstituted this court and created the statute of limitations (sec. 10), likewise created the right of appeal (sec. 5) and a liability for interest (sec. 7). It is expressly provided "That every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition be filed" within six years; but it is also expressly provided "That in all cases of final judgments by said court" in favor of the claimant "interest thereon at the rate of 5 per cent. shall be allowed." Many judgments in favor of claimants were recovered in the captured property cases, and many, and for large amounts, were suspended by appeals to the Supreme Court; yet in no case was interest upon such a judgment ever allowed or paid.

22 If there was a personal liability on the part of the Government in those cases as to which it can invoke the protection of the statute of limitations, then there was a personal liability for interest pending an appeal on those judgments, which, certainly, in law, in equity, and in good conscience, it is still bound to pay, as is very clearly shown by our brother, Mr. Justice Scofield, in Hobb's case (19 C. Cls. R., 220).

The case of Zellner (9 Wall. R., 244) was the first captured cotton case which came before the Supreme Court,* and there are expressions in the opinion which have frequently been miscited and misunderstood. The decision was rendered in proceedings to obtain a mandamus, and relates to the single question of there being a right to appeal in that class of cases. The language of the opinion is to be construed in connection with that fact. Several years afterward the Elgee cotton case (10 C. Cls. R., 181) came before the court, a case elaborately argued on behalf of the three adverse claimants, and there it was said of suits under the abandoned or captured property act: "That statute (act March 12, 1863) furnishes a complete system for the prosecution of claims under it, and defines the extent of the rights which those who claim an interest in the proceeds of property captured or abandoned during the civil war may assert against the Government." The two decisions are not inconsistent. The former relates to a matter of practice and procedure, as to which it holds the general provisions of law governing practice and procedure applicable; the latter to rights and equities, as to which it holds the abandoned or captured property act to constitute a complete system.

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* The following is the order in which the decisions were rendered that bear upon the question under consideration:

COURT OF CLAIMS.		SUPREME COURT.	
Term.		Term.	
1864.	*Tibbetts*, 1 C. Cls., 169.		
1866.	*Turner*, 2 *id.*, 390.		
1868.	*Woodruff*, 4 *id.*, 486.		
1869.	*Woodruff & Camp*, 5 *id.*, 645.	1869.	*Zellner*, 9 Wall., 244.
1870.	*Rothschild*, 6 *id.*, 204.	1869.	*Anderson*, 9 *id.*, 56.
1870.	*Wylie*, 6 *id.*, 295.	1869.	*Padelford*, 9 *id.*, 531.
1871.	*Woodruff*, 7 *id.*, 605.	1871.	*Klein*, 13 *id.*, 128.
1871.	*Price*, 7 *id.*, 567.	1874.	*Elgee Cases*, 22 *id.*, 180, 184.
1873.	*Boyd*, 9 *id.*, 419.	1875.	*Intermingled Cotton Cases*, 92 U. S., 551.

What, then, is the condition of the claimant's case?

On the 20th August, 1868, Robert Erwin was the equitable owner of a fund in the Treasury, of which the equitable title had never been divested from himself, being then held by the Government as his trustee. On that day he might have instituted a suit for the fund, but on that day the jurisdictional period for instituting such suits expired. A provision of law confining jurisdiction to a certain period no more affects the party or the cause of action than a provision of law confining jurisdiction to a certain territory. Therefore Erwin's right to the fund did not expire with the right of the court to entertain his case. The effect of the statute was simply that on that day as to such cases the door of the court was shut.

On the 5th February, 1877, Congress reopened the door by passing the private act (19 Stat. L., p. 509). The original abandoned or captured property act said that the door should stand open for two years;
23 the private act set no limitation of the kind, but leaves it open still, and still continues to declare that "the Court of Claims may take jurisdiction" of the claim. The private act does not recreate the claim; it does not validate it; it does not remove any presumption of payment from it; it simply opens the door of the court and allows whoever may be entitled to do so to bring the claim in.

Why, then, should not the claim be heard? The grant of jurisdiction has not expired; the private act has not been repealed; it still continues to say "the Court of Claims may take jurisdiction under the provisions of the act of March 12, 1863," "of the claims of Robert Erwin;" why, then, should not the Court of Claims take jurisdiction and adjudge the case?

The counsel for the Government answers that the general statute of limitations applies to this demand and bars the suit.

If the statute of limitations applies so as to preclude a trial upon the merits, it must apply not to the door of jurisdiction, but to the claim itself. Statutes of limitation are statutes of repose which do not extend to courts nor affect jurisdiction, but which attach to a debt or demand a presumption of payment, and operate to extinguish the thing itself as completely as if payment had been made. Therefore, if the statute of limitations applies to this claim, neither Robert Erwin, nor his assignee, nor any other person can ever assert a right to the fund derived from his cotton. All other claimants can; but this claim must be considered in law as actually paid and extinguished. It is conceded that the claim was not so extinguished when the private act was passed; it is conceded that none other of the thousands of claims which are still outstanding upon the captured property fund is presumptively or legally extinguished by the statute of limitations. Why, then, is this? How is it possible that Congress by passing an act, without the solicitation of the legal owner of the claim, the present claimant, authorizing a court to take jurisdiction of a case and nothing more, can have attached to the claim itself another statute not previously applicable to it, which should in time work out a legal presumption of payment and an absolute extinguishment of the claimant's rights?

If it be asked whether this thing can go on forever, the answer seems a very plain one. Congress did not here pass a general act, nor an act affecting a class of claims, but made a grant of special jurisdiction for the benefit of a single, isolated case; the act of grace and favor did not confer a

right, but provided a remedy; Congress can take away the remedy at any time without trenching upon the claimant's rights.

The counsel for the claimant has supposed that in the administration of the abandoned or captured property act the fund in the Treasury was treated by this court as a fund in equity, and the counsel is right in his supposition. Considering that it dealt with millions and must involve some of the most perplexing questions that could possibly be brought before a court, that act was in one particular probably the most extraordinary statute that was ever enacted. All that relates to the jurisdiction and duties of the court, and to the rights and disabilities of the parties, is to be found in nine lines which are thrust into a section primarily relating to the bonds and books of account of agents of the Treasury. The judges who had to bear the heat and burden of that day in determining principles,
24 in devising remedies, in framing a system which should be commensurate with the necessities of the situation—that is to say, the judges who administered the statute from the case of Tibbitts, in 1 C. Cls. R. (p. 169), to the case of Boyd, in the ninth volume (p. 419), had an absolutely novel subject of jurisprudence assigned to them without one word of statutory guidance to direct them and without a precedent to be gathered from all the courts in the world.*

Whatever may be thought of the wisdom of their conclusion, one thing is incontrovertible, and that is, that they, eventually, believed the fund in the Treasury to be a fund in equity, and that they exercised in regard to it whatever power of a court of equity might be necessary to protect the fund. The interlocutory proceedings (4 C. Cls. R., 486; 5 id., 645) and the final decree (7 id., 605) in the Elgee cotton case, and the decree in the case of Rothschild (6 id., 244) will illustrate to any lawyer with any knowledge of equity jurisdiction that the court was dealing with rights and remedies which belong to the discretionary powers of a court of equity, and which are not the rights and remedies that come within the inflexible jurisdiction of a court of law. Some attempts have been made to show that courts of law have dealt with implied trusts in some such way, but the only authorities that could be found were Bacon's Abridgment and Reeve's History of the Common Law, and they, unhappily, related to a time when the court of chancery did not exist as a court of equity, and when the system of equity jurisprudence was not yet devised.

But I do not regard the statute of limitation as necessarily exclusive of equity cases. I place my conclusion here entirely upon the ground that the private act granted a remedy; that the remedy was not limited as to time, and that there is no law which attaches to this claim a presumption of payment.

*There are other curious facts connected with this branch of jurisdiction. The abandoned or captured property fund existed before the abandoned or captured property act. (See Goodman's case, 14 C. Cls. R., 547, where the history of the fund is given.) It was not covered into the Treasury until after the joint resolution, 30th March, 1868 (15 Stat., and p. 251); no appropriation was ever made by Congress for the payment of a judgment to be satisfied out of it; and it continued to be treated as a separate fund subject to the terms of the original act until the revisers by incorporating that act into the Revised Statutes repealed it; and then the fund was placed among the permanent appropriations (Rev. Stat., sec. 3689), the statute expressly declaring that the permanent appropriation is "For the return of proceeds from the sale of captured and abandoned property to the owners thereof."

25 VII.—*Final judgment of the court.*

At a Court of Claims, held in the city of Washington, on the 17th day of May, A. D. 1886, judgment was ordered to be entered in favor of the defendants, and that the petition of Lepine C. Rice, assignee, be dismissed.

26 *Application of claimant for, and allowance of, appeal.*

LEPINE C. RICE, ASSIGNEE,
vs.
THE UNITED STATES. } No. 14781.

And now comes the claimant in this cause, by his attorney of record, and respectfully prays that he may be allowed an appeal to the Supreme Court of the United States from the decision and order of this court, made and filed herein May 17th, 1886, dismissing his petition for the reasons set forth in the opinion of the court rendered.

ALBERT SMALL,
Att'y for Claimant.

Filed May 19, 1886.

And now, to wit, May 19, 1886, it is ordered by the court that the appeal be allowed as prayed for.

WILLIAM A. RICHARDSON,
Chief Justice.

27 In the Court of Claims.

LEPINE C. RICE, ASSIGNEE,
versus
THE UNITED STATES. } No. 14781.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the opinion of the court, of the judgment of the court dismissing the petition, of the application of the claimant for the allowance of appeal to the Supreme Court of the United States, and of the order allowing said appeal.

In testimony whereof I have hereunto set my hand, and affixed the seal of said Court of Claims, at Washington City, this 30 day of September, A. D. 1886.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

(Indorsement on cover:) No. 1269. Lepine C. Rice, assignee of Robert Erwin and Charles S. Hardee, trading as Erwin and Hardee, appellant, vs. The United States. Court of Claims. Filed October 29, 1886.

IN THE

Supreme Court of the United States,

No. 1269,

OCTOBER TERM, 1886.

LEPINE C. RICE, Assignee, Appellant,

vs.

THE UNITED STATES, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT,

ALBERT SMALL,
SAM'L SHELLABARGER,
J. M. WILSON,
CHARLES N. WEST,
CHARLES MARSHALL,
Counsel.

Daily and Weekly Globe Steam Print, Hagerstown, Md.

IN THE

Supreme Court of the United States.

LEPINE C. RICE, ASSIGNEE, Appellant,	No. 1269,
vs.	October Term,
THE UNITED STATES, Appellee.	1886.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

This appeal is from the decision and decree of the Court of Claims, dismissing the petition of the Claimant.

ASSIGNMENT OF ERROR.

It is assigned as error that the Court of Claims has applied, in bar of the Appellant's right of action as presented by his petition,—*filed under a Special Act of Congress*, entitled "An Act for the relief of Robert Erwin," passed Feb. 5, 1877, 19 Stat. 509,—the limitation of Rev. Stat. sec. 1069.

STATEMENT OF FACTS AND SYNOPSIS OF ARGUMENT.

We desire at the outset of this Brief, to present

a condensed statement of the characteristics of the case and the propositions which we seek to maintain, by a more full discussion and citation of authorities than is presented in this opening synopsis.

THE FACTS OF THE CASE, AND THE HISTORY OF THE CLAIMS, are as follow:

1:—The petition in this case was filed in the Court of Claims by Lepine C. Rice, as Assignee in Bankruptcy of Robert Erwin, Feb. 17, 1886.

2:—The United States in defence filed a motion to dismiss for want of jurisdiction, and a general demurrer.

3:—May 17th, 1886, the Court of Claims dismissed the petition, upon the ground that the cause of action is barred by the six years' limitation prescribed in Rev. Stat. sec. 1069.

4:—This action by the Assignee is founded on the provisions of the Act of Congress of Feb. 5, 1877, 19 Stat. 509, which enacts:

"That the Court of Claims may take jurisdiction under the provisions of the Act of March twelfth, eighteen hundred and sixty-three, entitled 'An Act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' of the claims of Robert Erwin, of Savannah, Georgia, for property alleged to have been taken from him, which claims were by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act."

5:—R. H. Footman was first appointed Assignee of said Erwin, upon his being adjudicated a bankrupt, as a member of the firm of Erwin & Hardee, Jan. 15, 1869.

6:—Feb. 23, 1877, upon the resignation of Foot-

man as Assignee, Lepine C. Rice, the Claimant, was appointed his successor by the District Court for the Southern District of Georgia, and he proceeded to administer the bankrupt estate.

7:—Dec. 7, 1872, at a sale by the Assignee of the remaining assets of the Bankrupt's estate, Erwin himself became the purchaser, and claimed thus to have purchased the claims involved in this suit, and so to have become again the owner thereof.

8:—Jan. 6, 1873, Erwin begun a suit in the Court of Claims for the recovery of one of these claims; and the same was prosecuted and continued from time to time, without a final judgment, until the passage of the Special Act above quoted.

9:—After the passage of that Act he amended his petition then pending in the action brought Jan. 1873, setting up and relying upon the provisions of that Act.

10:—After such amendment, and other proceedings, the Court of Claims proceeded to consider and decide the case at Dec. Term, 1877, a report of which is found in *Erwin* v. *U. S.*, 13 C. Cls., beginning at p. 49, where will be found a full statement of the facts found by the Court. The Court held that the claim sued upon, and as found sustained by the proof in the cause, had passed as assets to the Assignee, and the attempted purchase, for the reasons of fact noted, gave Erwin no title; and the Special Act of Feb. 5, 1877, was not intended to and did not re-invest the title in him.

11:—The case, thus brought by Erwin, was brought by appeal to this Court, and is reported in 97 U. S., 392–397, where this Court sustains the rulings of the Court of Claims and affirms its judgment.

12:—It will be seen by the Record, folios 1 and 2, there were two parcels of cotton sued for in sepa-

rate actions in the Court of Claims; one for $49,618.39; one for $119,857.34; the former alleged to have been seized about Dec. 21, 1864, and the latter about July 1, 1865, the proceeds of each going into the Treasury. It was the suit for the first parcel that was decided and appealed; the other case was not appealed, but was dismissed by the Court of Claims in pursuance of the judgment of affirmance of this Court.

Propositions of Law.

The Controlling Proposition of law which we submit, upon the facts as recited, is that the Statute of Limitations, contained in Rev. Stat. sec. 1069, which provides: "Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years afterthe claim first accrues," *has no application in the present case.*

We base this proposition on *two* distinct grounds:—

First:—That the money now sued for is held by the Government as Trustee; and since the jurisdictional Act of Feb. 5, 1877 revived a right of action in behalf of these claims, and for such money, and prescribed no limitation of time; and since the Government as such Trustee is amenable to the same rules governing trusts as individuals are, therefore, there is here no limitation, *the trust never having been disavowed* by the Trustee: and

Second:—That whether or not this position is sustained, yet, since the Special Act gives a right of action, controlled as to its merits by the Captured and Abandoned Property Act without affixing anew any limitation; and since this right of action be-

longs to *a special class of claims and remedies which had a limitation of its own*, a limitation which was removed by the Act of Feb. 5th, therefore the six years' limitation, above named, *as to this special class of claims and remedies*, has no application.

In support of the first ground, that the remedy here given, being one in relation to a trust, the Statute of Limitations, *unless specially prescribed*, does not apply, we submit the following reasons and authorities.

First:—That the present action is prosecuted under and as to its merits is governed only by the provisions and principles of the Captured and Abandoned Property Act, is not only expressly declared by the Special Act,—which says that the court "may take jurisdiction *under the provisions of the act of March* 12, 1863,"—but this Court in the case of *Erwin* v. *U. S.*, 97 U. S. 395, has expressly held that the Act

"was not intended to enlarge or affect his title to the claim, or *to change his position in Court from what it would have been had he instituted his suit within the two years prescribed by that act.* His claim must, therefore, be considered like the claims of other suitors, both with respect to its original validity as a demand against the Government, and with respect to his title."

It is therefore established as a fixed proposition in this case, that *all* the incidents, qualities, rights, etc., which attach to such property, and the remedy for securing them, prescribed by the Captured and Abandoned Property Act, attach to the present claim and remedy, with the exception of the two years' bar which was removed by the Special Act, Feb. 5, 1877.

Second:—One of the qualities which attach to all money recoverable under the Captured and Aban-

doned Property Act is, that the Act impresses upon the money so held under it the quality of an EXPRESS TRUST, with all the legal and equitable consequences and rights which arise from such a trust relation.

Although the opinion of the Court below treated the decisions of this Court upon that point as, what the Chief Justice was pleased to style "dicta," yet it is thoroughly and conclusively settled, by the decisions of this Court, as well as the Court of Claims, that money so held under the Act, is in the the highest and every legal sense held under *an express trust*, and that such a trust is a *continuing trust*, defeasible only by a repudiation thereof by Congress, the authority which created it.

Stated in the language of this Court,—*Klein's Case* 13 Wall. 138 *et seqs*:—

"The Government *constituted itself the trustee* for those who were by that act declared entitled to the proceeds of captured and abandoned property, and for those whom it should *thereafter* recognize as entitled. * * * * We conclude, therefore, that the *title* to the proceeds of the property which came into the possession of the government by capture or abandonment, with the exceptions already noticed, was in *no case divested out of the original owner*. It was for the government itself to determine whether these proceeds should be restored to the owner or not."

This doctrine of the trust character, so impressed by law upon this money, is distinctly re-affirmed and stated in cases which will be more particularly noticed hereafter: the cases in this Court being as follow: (some of which are cited in Judge Nott's dissenting opinion in this case.)

Anderson's Case, 9 Wall. 65; *Padelford's*, Id. 538; *Hall's*, 92 U. S. 28; *Lamar* v. *Browne*, Id. 195; *Ross's Case*, Id. 282; *Young's*, 97 U. S. 61;

In the *Intermingled Cotton Cases*, 92 U. S. 653, this Court, speaking of money arising from such cotton, says :—

"The aggregate of the whole is no more than the amount of money in the Treasury to the credit of the fund, and which, *as we have often decided, is a trust* for the benefit of such as should establish their claim to it under the provisions of the Abandoned or Captured Property Act."

Many other cases in this Court in effect recognize the same doctrine, but without explicitly discussing or stating in terms the trust character of the Government's possession of the fund so accruing.

The cases in the Court of Claims where the same view is held and declared, are too numerous to mention. No member of that Court has more explicitly stated this doctrine than the Chief Justice who. in the opinion in this case, pronounced all such ruling as "*dicta*." Some of the cases in that Court, recognizing this trust quality, are also cited in Judge Nott's dissenting opinion at folio 22 of the Record. One of the cases in which Ch. J. Richardson has declared this doctrine is *Webb & Co.* v. *U. S.* 20 C. Cls. 499, where he cites repeated decisions of this Court affirming that the fund in the Treasury is held in trust.

Another and one of the last and most conspicuous decisions by that Court, affirming the trust quality of these proceeds of captured cotton is *Fripp's Case*, 19 C. Cls. 668, in which the Court *unanimously* says:

"The Supreme Court decided in Mrs. Taylor's Case, 104 U. S. 216, that these surplus funds derived from the sale of land are *trust funds*, and that *the Government is the trustee* of the rightful claimant. The fund in the Treasury, therefore, is *precisely like the fund in the Treasury derived from the sale of captured cottons*, save for the broad distinction that the owner designated in the one Statute must be the

owner of real property, and the owner designated in the other was generally the owner of personal property."

Third:—It must be carefully observed that these decisions, affixing to the fund this trust character, resort to this fact for a distinct and important judicial purpose, as is explained in *Klein's Case*, namely, for the purpose of affixing judicial and property obligations upon the fund, and *this as against the Government.* These rulings have been made to establish that the Government does not stand in the relation of an absolute sovereign and owner, as to this money, and as such, entitled to exercise in the Courts its uncontrolled pleasure touching the property or the fund; but that the property, on the contrary, when dealt with in the Courts, is under the control of the Constitutional principle that no property shall be taken except by due process of law.

From this last proposition naturally and inevitably follows another:

Fourth:—The Government being in possession of this money as a trustee under an express trust, is obliged, in cases where it has consented to be sued in respect of it, to account for the property, in such authorized suit, upon precisely *the same judicial principles* as are applicable to private suitors in like cases. This doctrine, that as a suitor the United States stands just as one of its citizens, is exceedingly familiar and thoroughly settled, and will be found decided in the following cases:

U. S. v. *Flint*, 4 Sawyer, 43; *Fendall* v. *U. S.* 14 C. Cls. 247, 251, 252, and cases there cited; *Smoot's Case*, 15 Wall. 45; *U. S.* v. *Smith*, 94 U. S. 214.

Fifth:—This Court has, in a number of cases, held that as between the United States and the beneficiary of property or money held in trust by it,

the equitable rule applies; and that, until a repudiation of the trust by the Goverment, limitations do not begin to run. We need do no more in this synopsis than refer to the cases:

In *U. S.* v. *Taylor*, 104 U. S. 216, 222; *U. S.* v. *Lawton*, 110 U. S. 146, 149, and the cases there cited, and in *Phillippi* v. *Phillippe*, 115 U. S. 156, 157, this doctrine is explicitly declared.

Sixth:—In the present case, the trust being created by the political branch of the Government through an act of Congress, and such act of Congress not authorizing any officer or party to deal with or repudiate the trust, and there being no act of Congress which has repudiated it; but, on the contrary, the Special Act of Feb. 5, 1877 having expressly *reaffirmed the continuing existence of the trust*, there has therefore been no repudiation of it, and the trust continues *in virtue of that Act* to the present time; and hence the right of action is not barred by *any* Statute of Limitations.

There are other considerations which will be noticed hereafter, which establish the view that (in virtue of the Special Act of Feb. 5, 1877, and of the trust nature impressed upon the fund, and of the special and peculiar character of this property and of the remedy provided,) there is no bar of the claim found in Sec. 1069. Some of these additional considerations will be presented under the next ground.

OUR SECOND GROUND WE RESTATE AS FOLLOWS:

That whether our first proposition,—that as the act creates a trust there is no bar of limitation applicable,—is sustained or not; yet, since the Special Act, without *expressed* limitation, and so without *any* limitation, gives a right of action under the Captured

and Abandoned Property Act, and since this right of action belongs to a *special class of claims and remedies* which had a limitation of its own, which was removed by the Special Act, therefore the six years' limitation of Sec. 1069, as to this special class of claims and remedies, has no application.

In support of this ground we submit the following considerations.

First:—It is a general and universal principle of law that where a special right of action is created by and arises out of a special act of legislation, the action itself being based and controlled by such special legislation, there and to such actions, the general Statutes of Limitations of the Government have no application, and the statutory case is barred by no Statute of Limitations, except such as is provided in the special act; and if none be in the special act, then it is not subject to *any* limitation.

This doctrine is stated in *Angel on Limitations*, Sec. 80, thus:

"It has long been established that where the liability of the defendant is created not merely by the act of the parties, but by the positive requisitions of a statute, the plaintiff is not barred:"—

that is by a general Statute of Limitations.

The same doctrine is stated in *Wood on Limitations*, Sec. 36, p. 74 *et. seqs.;* and will, in substance be found in the following recent cases:

C. L. & W. R. R. Co. v. *Burson*, 61 Pa. St. 369; *Harman* v. *Westchester*. 63 Id. 475; *McClintock* v. *Pittsburg, &c., R. R. Co.*, 66 Id. 404; *De Haven* v. *Bartholomew*. 57 Id. 129; *Ward* v. *Reeder*, 2 H. & McH. 154; *French* v. *O'Neale*, Id. 401, 404, 408; *Wheelwright* v. *Greer*, 92 Mass. 391, and cases cited; *Bullard* v. *Bell*, 1 Mason, 288, and cases cited by Mr. Justice Story;

Dixon v. *B. & P. R. R. Co.*, 3 Am. & Eng. R. Cases, 205, per Hagner J. in Sup. Ct. Dist. Col., (1 Mackey 83–4); *Hogan* v. *Ingall*, 2 Cranch C. C. 354.

The substantial legal equivalent of this proposition may be thus expressed:

Wherever a special class of rights and remedies are created by special enactment, and such cases, by the law creating them, have affixed to them a Special Limitation of their own, there the general Statute of Limitations has no application and will not be applied.

This doctrine will be found stated with more or less distinctness in the following cases:—

In *Webb & Co.*, v. *U. S.*, 20 C. Cls. 494, the Court says:

"A class of cases made subject to a special provision as to the time within which they must be prosecuted, are thereby taken out of the general Statute of Limitations;" citing *Fendall's Case*, 16 C. Cls. 120.

In *Ford* v. *U. S.*, 19 C. Cls. 525, the same Court, (Drake, C. J.,) says, speaking of the right of action given by the Captured and Abandoned Property Act:

"Had that act granted that privilege" (that of suing for the proceeds of cotton) "without specifying a time within which a loyal man should prefer his claim here, there is no reason why he might not come here now, though more than twenty-one years had elapsed, as in the present case, since his property was captured and sold."

So in the case of *Ford* v. *U. S.*, 116 U. S. 217, 218, this Court incidentally recognizes the same doctrine, saying:

"Every claim cognizable by the Court of Claims must be determined with reference to the limitation prescribed for claims of the class to which it belongs,

unless Congress, by Statute, otherwise directs."

In the *Elgee Cotton Cases*, 22 Wall. 185, this Court, speaking of the remedy created by the Captured and Abandoned Property Act, says:

"That Statute furnishes a *complete system* for the prosecution of claims under *it*, and defines the extent of the rights which those who claim an interest in the proceeds of property captured or abandoned during the civil war may assert against the Government. *According to the well known rules of statutory construction the system is exclusive of all others*, and the rights defined are the only ones which can be enforced in a judicial proceeding."

This is an assertion of the exact principle for which we contend, that "according to the well known rules of statutory construction the system *is* exclusive of all others." Our present contention is that as the system *is exclusive of all others*, therefore the system excludes from it the six years' bar.

The same thing will be found in *Haycraft's Case*, 22 Wall. 98; *Atocha's Case*, 17 Wall. 444; *U. S.* v. *Kauffman*, 96 U. S. 569; *Lamar* v. *McCulloch*, 115 U. S. 186; *Potter's Dwarris*, 275, note 5 and cases there cited.

The result, therefore, of what has now been prepresented in respect of the second proposition is this:

(1.) The present right of action is Statutory, special, anomolous and, in kind unprecedented prior to the Captured and Abandoned Property Act, and is governed by its own principles, qualities and Statutes.

(2.) The present case is one prosecuted under, and as to its merits controlled by, the Captured and Abandoned Property Act strictly, and belongs exclusively to the class of cases created by that Act.

(3.) The present cause of action originally had a two years' limitation of jurisdiction of its own, and the Statute excluded all other limitations than that one.

(4.) The Special Act did no more than re-establish the jurisdiction of the Court under the Captured and Abandoned Property Act, by removing the two-years' bar, such re-establishment being without any new limitation, and hence without *any* limitation.

(5.) For the reasons above given growing out of the special statutory nature of this action, the general Statute of Limitations applicable to cases generally in the Court of Claims *does not* apply to this case.

(6.) To make the six-years' limitation apply would result in this absurdity: that if it applies and bars the action at *this* time it applied equally at the date of the Special Act, and the action was then barred by it, because at that time the six-years' bar had, if it was applicable, defeated the right of action. At that date more than six years had passed since the right of action first accrued to either Erwin or his Assignee; and therefore, to make that bar applicable would render the Special Act a vain thing, and one giving no right of action.

There are other points which we will consider more fully as we proceed with the discussion, considering also, in more fullness and detail the propositions already presented.

Such, in substance, are the main features of this case. But this statement, even as a *partial and preliminary synopsis* of the Appellant's argument, would be defective did it not further notice a view of the case, based upon statutory provisions and decisions thereon, which may be claimed to be in contraven-

tion of the positions just stated.

That opposing view may be briefly stated thus:

As Sec. 1059 Rev. Stat. expressly puts claims under the Captured and Abandoned Property Act under the general jurisdiction of the Court of Claims; and as the present case is one prosecuted under that Act; and as Sec. 1069 bars every claim cognizable by the Court unless the petition is filed within six years after the claim first accrued; and as, moreover, the claim in this case accrued, at the latest, at the date of the Special Act, Feb. 5, 1877, *therefore*, this claim was barred, by the six years' limitation, at the date on which the petition was filed.

And this view of the matter may be supposed to be sustained by the cases of *Clark* v. *U. S.*, 99 U. S. 493 and *Ford* v. *U. S.*, 116 U. S. 213.

If such contention shall be urged in this case, we think the reply is quite obvious and conclusive, and is this:

That Sec. 1069 is *confined* in its operation to cases, and classes of cases, of which the Court of Claims takes cognizance in virtue of this *general* law conferring and defining its jurisdiction, and has no application to cases where the jurisdiction is acquired in virtue of a *special act, conferring a special jurisdiction* in a particular case, and where that act does not in terms subject the case to the general Statute of Limitations.

For example, and in illustration: This Court held in *Ford's Case* that since a *general* law, (Rev. Stat. sec. 1059,) authorized either House of Congress to refer claims to that Court, it would not be inferred as a matter of interpretation of such general law, that it was designed to permit *one* House to exempt claims so referred from the operation of a general

statute which would bar the claims so referred.

Instead of *Ford's Case* being one in defeat of our position above stated, it is one strongly in support of our contention that the Act of Feb. 5, 1877, was one designed to authorize and require the Court of Claims to adjudicate Erwin's case *on the merits*, as those merits are controlled by the Captured and Abandoned Property Act, but freed from the two-years' bar, and not subject to a six-years' bar which, if it applied at all, was complete at the date of the Special Act. Indeed this Court so declares in express words in that case, saying:

"It is undoubtedly within the power of Congress to place claims referred to that Court by the Senate or by the House of Representatives, on a better footing than other claims, by providing that they may be determined upon their merits, without reference to lapse of time, or any previous bar by limitation. But Congress had no purpose by its *general* legislation to establish such a policy. It has, in *special* cases, invested the Court of Claims with jurisdiction to determine a claim, relieved of the bar of limitation. Such was *Erwin's Case*, arising under the Captured and Abandoned Property Act, the purpose of the statute which referred it being construed as manifesting the intention of Congress, in respect of *that particular claim*, to remove the bar of limitation, and, without otherwise changing the claimant's position from what it would have been had he instituted suit in proper time, to permit an adjudication of the claim upon its merits. *Erwin* v. *United States*, 97 U. S. 392."

Here, then, is an express declaration by this Court that the Erwin Act was designed to require Erwin's claims to be determined *as if they had been begun within the two years named in the Captured and Abandoned Property Act*, and according to their merits, as such merits are determined by *that Act*, in a case commenced in due time. Such a case, so begun,

was not subject to the six-years' bar; and hence, if this language of the Court means anything it is decisive of the question, that the Special Act did not subject this case to any new bar unknown to the original act.

Indeed, the general principle stated above,—that where special cases are based on Special Statutes, in which either a special limitation is given for the case, or a limitation is removed and no new one affixed, or no limitation is affixed,—there, and in every such case, the general Statute of Limitation is not applicable, is distinctly recognized by the Court of Claims in such cases as

Braden's Case, 16 C. Cls. 410, par. 2;

Fendall's Case, Id. 120.

For the same reasons the case of *Clark* v. *U. S.*, 99 U. S. 493, has no application here.

That case was one, as is clearly shown by the petition and all the facts, not prosecuted under the Captured and Abandoned Property Act, but was "for money had and received," and under the doctrine of such cases as *U. S.* v. *State Bank*, 96 U. S. 36, and *Thayer* v. *U. S.*, 20 C. Cls. 441. Hence the six years' limitation might well be there applied. But even if it be regarded as prosecuted under the Captured and Abandoned Property Act, yet its prosecution was under it as a *general* law creating a jurisdiction, and hence was totally unlike the case at bar in that *this case is one sent to the Court by a special statute*, as to which this Court has in effect held, that it sends the case to the Court of Claims *to be tried on its merits as if begun within two years from the suppression of the rebellion*, and hence comes subject to no six years' Statute of Limitations.

With this synoptic presentation of the views and

considerations which, in our judgment, establish fully and incontrovertibly the right of the Appellant, in his fiduciary character, to maintain an action for the proceeds of Erwin's property, under the Special Act, and the power and so the duty of the Court to entertain jurisdiction of such action, we proceed to a fuller and more detailed examination and presentation of the questions involved in the appeal.

ARGUMENT.

The question involved in this Appeal is the right of the Claimant to maintain an action upon the claims of Robert Erwin, under the Special Statute and in conformity with the provisions of the Captured and Abandoned Property Act, as modified thereby.

His right it is confidently asserted can be maintained upon various grounds.

I.

THE ACTION IS UNDER THE SPECIAL STATUTE, REVIVING *pro hac vice* THE CAPTURED AND ABANDONED PROPERTY ACT, AND EXTENDS TO THIS CLAIMANT ALL THE BENEFITS OF THAT ACT.

The right of action under the original Act expired by its own limitation two years after the close of the war, Aug. 20, 1868.

The effect of a revival, such as this, as expressed by this Court, is:

"We are of opinion that by reviving an act, the legislature must be understood to give it from the time of its revival, precisely that force and effect

which it had at the moment when it expired." *The Aurora*, 7 Cranch, 382.

The form and effect of the Captured and Abandoned Property Act, in behalf of these claims, is, therefore, in no wise changed. The effect of the Special Statute is to extend to the claims the remedy provided by that Act, notwithstanding the limitation it prescribes. As said by this Court:

"The purpose of the Statute passed for the relief of the Appellant (Erwin) as is manifest on its face was to remove the bar of the Captured and Abandoned Property Act, which had arisen without his fault, or rather to confer jurisdiction upon the Court of Claims over his case, which otherwise could not have existed." *Erwin* v. *U. S.*, 97 U. S. 394.

And in commenting upon that case:

"The purpose of the Statute which referred it being construed as manifesting the intention of Congress, in respect of that particular claim to remove the bar of limitation, and without changing the claimant's position from what it would have been had he instituted suit in proper time, to permit an adjudication of the claim upon its merits." *Ford* v. *U. S.*, 116 U. S. 216.

The rights, therefore, which accrue to the Appellant in respect of "the claims of Robert Erwin," and the remedy provided, must be determined by the construction given to the original act.

II.

BY THE CAPTURED AND ABANDONED PROPERTY ACT, CONGRESS CREATED AN EXPRESS TRUST, THE GOVERNMENT BEING THE TRUSTEE; THE TRUST ESTATE THE FUND CREATED BY IT IN THE TREASURY; *the cestuis que trust, all who could bring themselves within the terms of the Act; and for the right thus created, a remedy by suit in the Court of Claims.*

For reasons of public policy the jurisdiction of the Court was limited as to its duration; no other limitation was imposed.

The Act has frequently passed under review, and its interpretation and effect are fully established.

As it effects the question of jurisdiction here raised, it was very fully considered in *Haycraft* v. *U. S.*, 22 Wall. 81. In that case it is said:

"This case has been argued to some extent as though it involved the consideration of a statute of limitations. *To our mind the question is one of jurisdiction.* A sovereign cannot be sued in his own courts except with his consent. * * * The appellant must, therefore, show that consent has been given to its prosecution. That being done, the jurisdiction of the Court is established and he may proceed. Otherwise not."

The Court then, after very fully discussing the provisions and machinery of the Act, says:

"In *Klein's Case*, the property collected under the act was said to be of 'a peculiar description, known only in the recent war, called captured and abandoned property.' * * * 'No similar legislation,' it was also said, 'is mentioned in history,' and 'the government constituted itself the trustee for those who were *by that act* declared entitled to the proceeds of captured and abandoned property, and for those whom it would *thereafter recognize as entitled.*'" * * * * "Under this construction the effect of the act was to provide a reward for submission to the government and the acceptance of amnesty, as well as authority for the seizure of property, and it is thus made to operate in two ways to weaken the insurgents: first, by depriving them of their property; and second, by inducing their adherents to submit to the authority of the United States as a means of regaining that which they had lost personally. In that view time is material. * * * The right of recovery was made to depend upon the employment

of the remedy provided by the Act. There was no promise even under the rulings in that case, except to such as should commence the suit in time, and upon trial be in a condition to bring themselves within the requirements of that Act. The promise, such as it is, was express. There is no room for implication."

That the fund in the Treasury created by the operation of the Act, is a trust fund, has been uniformly held by the Court of Claims and by this Court, and is expressly declared in the following cases:

Anderson's, 9 Wall. 65; *Padelford's*, Id. 538; *Klein's*, 13 Id. 128; *Haycraft's*, 22 Id. 181; *The Elgee Cotton Cases*, Id. 180; *Hall's*, 92 U. S. 28; *Lamar* v. *Browne*, Id. 195; *Ross's*, Id. 281; *The Intermingled Cotton Cases*, Id. 651; *Young's*, 97 U. S. 61.

There is no doubt of the right of a Government to create a trust by legislation. 1 Perry on Trusts, Sec. 30; *Alexander* v. *Duke of Wellington*, 2 R. & M. 35; *Stevens* v. *Bagwell*, 15 Ves. 140.

Every condition of an express trust is met by the provisions of this Act, as interpreted in the numerous cases occurring under it.

The Act did not divest the title of the owner, (*Klein's Case*; *Pugh's* 99 U. S. 269; *Winchester's*, Id. 372): the subject matter of the trust is fixed and certain: the beneficiaries are specifically determined: a jurisdiction is erected, and a remedy is provided for the enforcement of the rights created by the Act, *Haycraft's Case*; 2 Story Eq. Jur. sec. 964; 1 Spence Eq. p. 499.

The right and the remedy are given by the same Statute. As expressed by this Court, in *Elgee Cotton Cases*, 22 Wall. 185:

"That Statute furnishes a *complete system* for the prosecution of claims under it, and defines the ex-

tent of the rights which those who claim an interest in the proceeds of property captured or abandoned during the civil war, may assert against the Government. According to the well known rules of statutory construction *the system is exclusive of all others, and the rights defined are the only ones which can be enforced in any judicial proceeding.*"

The fact that the remedy is exclusive of all others; that it is for the enforcement of a specific, express trust; that, as is said in *Ross's Case*, 92 *U. S.* 282, "*its requirements are essential only to show that the United States is a trustee, holding his money for him,*" fixes the Equitable character of the remedy and the Equitable jurisdiction of the Court.

The Court of Claims has, with great uniformity, *until in this case*, recognized the fund as a trust fund, and the remedy as an Equitable proceeding; the most recent utterances of that Court, as of this, being very explicit and broad.

In the decision of this case below, Ch. J. Richardson, in pronouncing the opinion, assumes to treat the interpretation of the Act, given in Klein's Case, (as constituting a trust, and the Government as a Trustee,) "*dicta.*" Aside from the want of obedience due to the opinion of this Court in a case in which, upon appeal from its decision, the very question—the status of the claimant and the relation the Government held to such property—was at issue, the glaring inconsistency of his present denial with his recognition of the fiduciary nature of the Government's possession of the fund (*Webb's Case*, 20 C. Cls. 494,) is only equalled by his like inconsistency of view in this case with his holding also in *Webb's Case*, that:

"whatever application, if any, the six years' limitation in Sec, 1069 may have to other

classes of cases referred by one House of Congress, it can have none to this case, where the cause of action arises under the Abandoned and Captured Property Act, which has a two-years' limitation of its own."

In that case he also held that a reference by *one* House conferred jurisdiction: in the case at bar, that a reference by *both* Houses does not because the six years' bar *does* apply.

The Government, by all the cases, is declared to be the Trustee of a specific fund; and the remedy prescribed by the Act under which the fund arises, is the mode of identifying the beneficiaries of that fund. *Padelford's Case*, 9 Wall. 543; *Ross's*, 92 U. S. 282.

The actions brought under the Statute were in form against the United States; but it is only formally the defendant, because it is the Trustee, the holder of the fund of a part of which the claimant seeks to show he is owner. In the organization of the forms and system of procedure under the Act, as said in *Thomas's case*, 12 C. Cls. 277, it might have been by "information against the fund." Yet the Government is here as defendant, and the same rules at law and in equity obtain and apply to it when it consents,—as in the Special Act it does for the prosecution of the claims of Erwin,—to be made or to become a suitor in Court, which apply to its individual citizens. This principle is established beyond contradiction by many cases, among which we may cite:

U. S. v. *Flint*, 4 Sawyer, 43; *Fendall's Case*, 14 C. Cls. 247, 251; *U. S.* v. *Union Natl. Bank*, 10 Ben. 408; *Smoot's Case*, 15 Wall. 45; *U. S.* v. *Smith*, 94 U. S. 214; *U. S.* v. *State Bank*, 96 U. S. 30; *The Floyd Acceptances*, 7 Wall. 675.

"No special proceedings are prescribed to the Court of Claims or to the claimant: * * * they are to proceed, in the usual way, to hear and *adjudicate upon the question of ownership and right to the proceeds*, according to the proofs and law of the case." *Zellner's Case*, 9 Wall. 248.

Limitations do not run against an Express Trust.

Against such a trust limitations do not run until the Trustee by some unequivocal act denies the trust, or makes a specific adverse claim upon it, and the fact of such denial or adverse claim is brought to the knowledge of the *cestui que trust. U. S.* v. *Taylor*, 104 U. S. 216; *U. S.* v. *Lawton*, 110 U. S. 149; *Phillippi* v. *Phillippe*, 115 U. S. 156. This doctrine is so well known, and so constantly enforced that it needs no argument to sustain it; the application of the doctrine is made in the cases of *Taylor* and *Lawton*, *supra*, to actions arising under the Direct Tax Acts; and the analogy betweeen that trust and the one asserted here is forcibly stated by the Court of Claims in *Fripp's Exr.* v. *U. S.*, 19 *C. Cls.* 667, hereinbefore quoted.

It remains only upon this point to say, repeating the statements in the synopsis above, that there has been no disavowal of this trust, and no claim upon it, by the Trustee. In *Hodge's Case*, 18 C. Cls. 700, it is said a very large balance of the trust fund remains undisposed of in the Treasury. And it is a part of the legislative history of the period, that there is now pending before Congress proposed legislation to re-invest the Court with jurisdiction, to the end that the fund may be returned to those entitled to it, whose claims and suits failed in the Court because of the two years' limitation of its jurisdiction.

The Effect of the Special Act upon the Trust.

The intention of Congress to thus create an Express Trust, although, for the reasons assigned by this Court at page 95 of *Haycraft's Case*, the time within which the remedy, under the Act could be availed of was limited, is thus very forcibly stated by the Court of Claims in *Ford* v. *U. S.*, 19 C. Cls. 518:

"*Had that act granted that privilege, without specifying a time within which a loyal man should prefer his claim here, there is no reason why he might not come here now, though more than twenty-one years had elapsed, as in the present case, since his property was captured and sold.*"

It is submitted, therefore, that in respect of the claims of Erwin, jurisdiction was conferred anew, and without limitation of time, upon the Court of Claims, by the Erwin Act: that this jurisdiction was for the enforcement of the provisions of the Captured and Abandoned Property Act: that *that Act* declared, in behalf of the owners of property taken under it, *an Express Trust* in the fund in the Treasury: that the right of action in behalf of the beneficiaries is not barred by limitations until the Trustee repudiates the trust, and knowledge of that fact is brought home to the *cestui que trust;* that there has been no repudiation of this trust by the trustee, the Government: that the right of action upon these claims, under the Special Statute, passed by operation of law to the Assignee of the Bankrupt,—the Appellant; and that he is entitled to maintain an action upon them, of which the Court may, and so must, assume jurisdiction, unless he be barred or precluded in some other way.

The result, therefore, to state the present point in somewhat different form and language, is as follows:

(1.) The Captured and Abandoned Property Act did, as against the Government, and in favor of the persons entitled to the proceeds of the sales of such property, impress upon the fund in the Treasury the character of an express trust, with all the incidents, as between the Government and the persons so entitled, of such a trust.

(2.) Even if the two years' limitation of the original act would extinguish the trust quality so attached to the fund, at the expiration of that period as against those not suing within that time, (a proposition we do not admit;) yet the Special Act, in this case, has re-impressed upon the money arising from the sale of Erwin's property, such trust quality as it had under the original act; and that character remains attached to it until, by competent authority, the trust is repudiated and knowledge thereof is brought home to the beneficiary.

(3.) No power or authority is competent in this case to repudiate the trust, or to divest the property of that quality, except the power which created and declared the trust; that is, the political power of the Government exercised through an Act of Congress.

(4.) Neither Congress, nor any other authority has attempted to repudiate this trust; and hence it continues now in virtue of the Special Act.

(5.) Since this property is trust property, and the United States is the Trustee, and has consented through the Special Act to be sued; and since no limitation is contained in the Special Act restricting the time within which the beneficiary may sue the trustee; and since the same rules of law and equity apply in the courts against the Government as a suitor, as apply in cases of individual suitors, therefore, this suit, for the assertion and enforcement of

trust obligations, is not barred by any Statute of Limitations: and the bar of six years, of Sec. 1069, will not be imported into the case to defeat the rule that trust obligations are not barred, until within the statutory time after notice to the *cestui que trust* of the repudiation of the trust.

The Assignee's right to the proceeds is not barred by the two-years' limitation in the Bankrupt Law, or otherwise.

It is contended, however, that the Appellant's right of action as Assignee is barred by the provisions of the Bankrupt Act, Rev. Stat. sec. 5057, which limits his right to a period of two years from the time when the cause of action accrued to him; the limitation being upon the power of the Court to entertain jurisdiction in any such action, after such period had elapsed.

The same contention was made and is stated thus in *Upton* v. *McLaughlin*, 105 U. S. 642, where this Court, commenting upon *Bailey* v. *Glover*, (21 Wall. 342), cited to support that contention, says:

"But this Court held that the statute in question was a statute of limitation," and further that *Bailey* v. *Glover* "was a plain decision that the statute in question does not impose an absolute limit of two years after the appointment of the assignee, in respect to transactions which occurred before such appoinment, and that there is no want of power in the Court to entertain a suit after such two years has elapsed. This view was recognized and applied in *Gifford* v. *Helms* (98 U. S. 258.) * * * * The question is not to be treated as one of power or jurisdiction, but as one dependent on the principles applicable to statutes of limitation generally."

This Court accordingly refused to apply the limitation in bar of the Assignee's right of action.

In respect of the claims in this action it is decided *(Erwin's Case supra,)* that Erwin's interest in them passed by operation of the assignment in bankruptcy to his Assignee. He was, by the deed of assignment,

"subrogated to all the rights, legal and equitable, of the bankrupt. The statute in terms gave him the same right in any litigation he might institute which the bankrupt would have if the decree in bankruptcy had not been rendered and no assignment had been made. He was clothed with the power and duty to sue whenever suit was necessary." *Sanger* v. *Upton*, 91 U. S. 62.

And this Court, commenting upon *Erwin's Case*, in *Phelps* v. *McDonald*, 99 U. S. 304, says:

"If the thing be assigned, the right to collect the proceeds adheres to it and travels with it whithersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re*—possibilities coupled with an interest and claims growing out of property—pass to the Assignee. * * * The bankrupt law required that all suits by or against the Assignee should be brought within two years from the time the cause of action accrued. Rev. Stat. sec. 5057.

"But this provision relates to suits by or against the assignee with respect to parties other than the bankrupt. In a case like this it has no application."

So it was held in *Clark* v. *Clark*, 17 How. 315, a case under the Bankrupt Act of 1841,—*and like this in all its features*,—(which is quoted with approval in *Glenny* v. *Landon*, 98 U. S. 23,) "The interest adversely claimed, and which the Statute protects, if not sued for within two years, is an interest in a claimant other than the bankrupt; but supposing that Clark had been placed in that position, as to the fund in the Treasury, by his pretended purchase of his own assets. Yet as no cause of action accrued to the assignee in bankruptcy against Clark, until

he got possession of the money, and as he never held the fund adversely, it follows that the act did not apply."

Nor is his right of action limited by the fact that the Special Statute by its title is for "the relief of Robert Erwin," because the jurisdiction given is of "*the claims of Robert Erwin*," and the purpose of the act is not restricted to Erwin by the title to the Act. *Hadden* v. *The Collector*, 5 Wall. 110; *U. S.* v. *Fisher*, 2 Cranch, 358; *P. M. Gen* v. *Early*, 12 Wheat. 146.

In *Milnor* v. *Metz*, 16 Pet. 227, it was held without question that Metz, the Assignee, was entitled to recover under an Act for the relief of Milnor, the Insolvent. And in *Braden's Case*, 16 C. Cls. 403, that Court, in construing the words "the claims of" in such a statute, says:

"When the terms of a statute refer to something which is not set forth, a Court must necessarily look behind the Statute to ascertain what that something is."

With reference especially to actions in cases of express trusts, by an Assignee in Bankruptcy, it is held in the recent case of *Berry* v. *Sawyer*, 19 Fed. Rep. 286,—a case in the U. S C. Ct. for Pa.:

"The clause of the Bankrupt Act requiring all causes of action 'between an assignee in bankruptcy and a person claiming an adverse interest' to be prosecuted within two years, applies only when the interest has been actually adverse for two years; and the *interest of a trustee*, so long as he acknowledges the trust, is not adverse to that of his *cestui que trust*." See also, *Seymour* v. *Freer*, 8 Wall. 202; *Banks* v. *Ogden*, 2 Wall. 57.

In *Minot* v. *Tappan*, 122 Mass. 537, in which, *thirty-five years* after the appointment of the Assignee, his right to recover a trust fund due the bankrupt was

sought to be defeated by the plea of such a limitation, the Court says:

"The other question is whether the claim of the Assignee is barred by any statute of limitation, or is in any way precluded by lapse of time.

"It is not claimed that the Assignee is precluded by his laches from maintaining his right to the fund: but the Administrator of W. contends that the right of the Assignee is barred by the 8th section of the Act of 1841, which provides—(quoting the Act, which is *in totidem verbis* with sec. 5057):

"We are of opinion that this provision has no application to the case at bar. This is not a suit by or against the Assignee such as is contemplated by the Statute. This is a bill brought by trustees to obtain the instructions of the Court as to the parties to whom the fund in their hands belongs. They are mere stakeholders, and do not claim any adverse interest against the Assignee, and do not set up this Statute of Limitations."

This Court, in *Hall* v. *U. S.*, 92 U. S. 27, says the Government is *merely a fund-holder*, interested in seeing that the real owner gets the proceeds of his property. The Court of Claims takes a like view, in a very forcible argument, in *Woodruff's Case*, 4 C. Cls. 486, saying, of the character of the Government's possession of the fund: the Government "has an indirect interest on the issue of ownership; for if the claimant fails there, it holds as trustee for the true owner."

The same view is sustained by other recent decisions, the latest of which is that of Shipman J. of the U. S. Circ't Court, S. Dist. N. Y. in *Maynard* v. *Tilden*, 28 Fed, Rep. 793, in which he cites with approval *Gildersleeve* v. *Gaylor*, 15 Fed. Rep. 101.

The case of *Jenkins* v. *International Bank*, 106 U. S. 571, is not in contravention of the foregoing cases and positions, because that case simply held that one

owing a debt to a bankrupt was one holding adversely to him and to the Assignee; and hence that the two years' limitation of Sec. 5057 applied.

We have seen from the cases cited that a Trustee, in the absence of a repudiation of the trust, is not one holding adversely to his beneficiary.

We hold, therefore, that the right of the Assignee to maintain this action is fully established, and that he is entitled to a decree for the return of the proceeds (Rev. Stat. sec. 3689) of the sale of Erwin's property, now forming a part of the fund held in Express Trust in the Treasury, for the persons who under the provisions of the Captured and Abandoned Property Act are entitled thereto.

III.

The Question Involved in this Case,—as in Haycraft's—is one of Jurisdiction Alone; not of Limitation.

In presenting what we now propose to say upon the point that the limitation of two years, in the Captured and Abandoned Property Act, was purely and strictly jurisdictional, as distinguished from a limitation simply affecting the remedy; and was in this respect, in its legal elements and kind, totally distinct from the limitation in Sec. 1069, it is proper to preface the argument about to be made by fixing in the case this important fact; namely:

The introduction by the Revisors into the section defining the general jurisdiction of the Court—Sec. 1059—of Paragraph Four of that section, (classing therein money derived from the sales of Captured and Abandoned Property, under the Act of March 12, 1863,) has not the slightest tendency to deprive

the class of cases created by and under the last named act of the special, anomolous and statutory character which was affixed to them by that statute, or to bring them, in kind, within the classes covered by the Court's general jurisdiction.

At the time this revision of the Statutes was made, in 1874, it was impossible for the Court of Claims to take jurisdiction of any case under Paragraph Four of Sec. 1059, because the special jurisdiction of the Court had then forever ceased, owing to the lapse of more than two years from the suppression of the rebellion, (Aug. 20, 1868. See *Anderson's Case*, 9 Wall. 56.) And no case was ever begun, nor could any be begun after the introduction of that Paragraph into Sec. 1059. Hence the fact that it appears there has not the least possible significance in this case.

Such is the view of the Court of Claims as to the effect of this action of the Revisors, as expressed by Ch. J. Richardson, in *Wade's Case*, 21 C. Cls. 146.

If its introduction thus, in defining the jurisdiction of the Court, was of any legal avail, it was only to enable the Court to continue the exercise of the jurisdiction which had attached to cases begun within the time limited by the original act. (See as to the fact that no case was ever thus begun under that clause, as distinguished from those begun under Sec. 3 of the original Act, *Hodges' Case* 18 C. Cls. 703.)

If the Court of Claims has jurisdiction, it is of the claims of Robert Erwin, which by operation of the Bankrupt Act passed to the Appellant, as Assignee, carrying with the title to the claims every right of action which the owner, Erwin, had. *Erwin* v. *U. S.* 97 U. S. 397; *Phelps* v. *McDonald*, 99 U. S. 304; *Sanger* v. *Upton*, 91 U. S. 62; *Clark* v. *Clark*, 17 How.

315; *Milnor* v. *Metz*, 16 Pet. 227; *Minot* v. *Tappan*, 127 Mass. 333; *Berry* v. *Sawyer*, 19 Fed. Rep. 286.

He is not debarred from maintaining the action unless Erwin himself, if now suing under the Special Act, would be.

It is claimed, however, that the right of action is barred by Rev. Stat. sec. 1069.

The Special Statue was intended as we have seen to give the Court jurisdiction of these claims *relieved from the bar of limitation*, in order that they should be heard upon their merits. *Erwin's Case; Ford's Case.*

It may be contended this applies to the two-years' limit alone.

The limitation of Sec. 1069 is a *statute of repose*, affecting the remedy only, and not the cause of action. It is true, it may be said to affect the remedy by denying jurisdiction in all cases in which action is not brought within six years after the cause first accrues. But it is not an absolute bar: it provides, in itself, certain exceptions; and jurisdiction is essential to determine if the grounds of exception exist. It is not, therefore, jurisdictional, and has so been construed by the Court of Claims in *Thomas's Case*, 15 C. Cls. 335; *Webb's Case*, 20 C. Cls. 499, and many others.

But by the express terms of the Special Act jurisdiction is conferred *under the provisions of the Captured and Abandoned Property Act*, and that Act, and that Act only, authorized the Claimant to prefer his claim to the proceeds of his property thus seized and sold, in the Court of Claims. The right thus created arose wholly from the concession of the Captor, the Government; being a right new to jurisprudence, and dependent upon the Statute, the

remedy was necessarily special and peculiar, *Kidd's Case*, 8 C. Cls. 259; *Haycraft's Case, supra.* The limit of the consent was two years from a given event, not six years from the time the cause of action accrued; and it had no reference to the cause of action, nor to the character of the remedy provided, and it is repeatedly said raised no adverse claim to the fund. Jurisdiction was conferred for a limited period for reasons wholly dissociated from and independent of the character of the property, and the nature of the action. These reasons had their origin, so far as they affected the owner, and the Government as Trustee, in his political status, and the remedy was offered as an inducement to an early cessation of the hostilities out of which came the need of the Act.

The reasons for the limitation of Sec. 1069 were altogether different.

Prior to the Act of March 3, 1863, the Court of Claims existed rather as a legal commission, with no power to render a judgment binding the Government. There were grounds of liability of the Government upon which, at common law, but that the sovereign cannot be sued but with his consent, it could have been subjected to litigation and judgment. The Act of March 3, 1863, re-organizing the Court, and making it in fact a Court, grouped these grounds of liability, and defined the limits of jurisdiction, now the provisions of Sec. 1059. The *general* jurisdiction of the Court was then and thus established. Since consent to be sued was thus given, it became necessary, *ut sit finis litium*, that the right of litigants should be limited as to the time within which they should avail of the remedy thus provided, —a time at which the liability of the Government

should cease. An ordinary Statute of Limitations was enacted, now Sec. 1069; and since the *form* of action was general and uniform for all causes of action, the peculiar language of the Section was used; "Every action," &c.

But the jurisdiction thus conferred upon the Court by the Act,—its general jurisdiction,—is held by the Court of Claims, and by this Court, to *apply only to actions ex contractu.*

Gibbons v. *U. S.*, 8 Wall. 274; *Smoot's Case*, 15, Wall. 45; *Ex-parte Atocha*, 17 Wall. 444; *Langford* v. *U. S.*, 101 U. S. 341; *U. S.* v. *Lee*, 106 U. S. 241; *Great West. Ins. Co.* v. *U. S.*, 112 U. S. 199.

As the Government can be sued only with its consent; and this consent *generally* is given only as to such causes of action as existed at common law between individuals, the terms and conditions of the consent must be strictly observed. It is held, therefore, that the Court cannot add exceptions to Sec. 1069. *McElrath* v. *U. S.*, 102 U. S. 426; *Kendall* v. *U. S.*, 107 U. S. 123. By like reasoning it will be conceded it cannot extend the operations of that Section to subjects not falling within the jurisdiction created by that Act.

When Congress undertakes in special cases, or a special class of cases, to give such consent, the jurisdiction conferred must depend upon the Special Statute, and

"it is limited precisely to such cases both in regard to parties and to the cause of action Congress has prescribed.

"It is true that ordinarily, when we seek for the foundation of this jurisdiction, we look to the general laws creating the Court and defining causes of which it may have cognizance. But it is equally true that whenever Congress chooses to withdraw

from that jurisdiction any class of cases which had before been committed to its control, as it has done more than once, it has the power to do so, or to prescribe the rule by which such cases may be determined. Its right to do this in regard to any particular case, as well as a class of cases, must rest on the same foundation, and no reason can be perceived why Congress may not at any time withdraw a particular case from the cognizance of that Court, *or prescribe in such case the circumstances under which alone the Court may render a judgment against the Government.*" *De Groot* v. *U. S.*, 5 Wall. 431; see also, *Arnson* v. *Murphy*, 109 U. S. 238; *Mitchell* v. *Clark*, 110 U. S. 642.

In respect of the fund arising under the operation of the original act, Congress has provided that the owner may "make a claim for the return of the proceeds of his property:" and upon proof of the facts that such proceeds do exist, as a part of the fund, and of the claimant's right to them, the Court must decree in his favor.

The creation of a distinct and specific remedy is thus made by the limitation of the conditions upon which such restoration shall depend,—and the further limitation in time of the jurisdiction of the Court. The right of action and the remedy are thus special; and no argument in favor of such application of the provisions of Sec. 1069 can be found in the fact that the forum, in which the remedy must be sought, is the Court of Claims. The liability of the Government to return, from the fund in the Treasury, the proceeds of the sale of such property is established by the Act itself: the only questions in which the Government is interested, and the only ones with which the Court is authorized to deal, are those of ownership of property seized, and the right to the proceeds, and these, *not as against the Government,*

but as against any and every other claimant. *Woodruff's Case*, 4 C. Cls. 486. These must be established to the satisfaction of the Court, and within the period limited. As expressed by Mr. Justice Strong, in *Ross's Case*, 92 U. S. 282:

"It is incumbent upon a claimant * * * to establish, by sufficient proof, that the property captured or abandoned came into the hands of a Treasury agent; that it was sold; that the proceeds of the sale were paid into the Treasury of the United States; and that he was owner of the property, and entitled to the proceeds thereof. *All this is essential to show that the United States is a trustee for him, holding his money.*"

And the Court of Claims expresses the same view in *Brown's Case*, 6 C. Cls. 171.

The right and remedy being thus special and exclusive, the limitation of Sec. 1069 could not, therefore, have been applied to any case arising under the Act, had the peculiar limit, "two years after the suppression of the rebellion," carried the jurisdictional period to a point of time more than six years after the time a cause of action accrued; that is, the time of seizure, sale and deposit.

It did not and could not apply in any other view. This is in effect, if not in fact, the point decided in *Haycraft's Case.*

That was a suit upon an implied assumpsit; that is, it was sought to charge the Government as liable in an *action brought under the general jurisdiction of the Court.* To this, defence was made that the suit was barred because not brought within six years from the accrual of the cause of action. The Court of Claims, and this Court, held that it was not a question of limitation, but of *jurisdiction.* The Claimant cannot proceed without the consent of the Government; and consent in cases such as this is

given only by the Captured and Abandoned Property Act.

To the same effect is *Clark* v. *U. S.*, 99 U. S. 493.

In that case, Clark & Fulton, who resided at New Orleans, to facilitate the transportation of their cotton from some interior point, consigned it to one Dexter, a Treasury Agent at Mobile. Dexter did not deliver it over to them; but, under general and final orders, shipped it with all other cotton in his charge to the Treasury Agent in New York, where it was sold and the proceeds were paid into the Treasury. The Claimants brought suit, in the Court of Claims, alleging these facts, and that such seizure by the Treasury Agent was unlawful; that the property was not abandoned or captured, or liable to seizure or confiscation; and the Government was therefore liable to them for the proceeds. Defence was made upon pleas of "not indebted," and limitations both of two years, and of six years.

The Court of Claims dismissed the petition without filing an opinion: but in 15 C. Cls. 617, it is said that it "decided that the action cannot be maintained as an action on contract, and that the suit should have been brought under the Captured and Abandoned Property Act."

This Court (99 U. S. 494,) after stating the facts, in the language of the "finding" of the Court of Claims, says:

"The United States rely upon two defences:

1. That the petitioners did not, within two years after the suppression of the rebellion, prefer their claim in the Court of Claims.

This limitation is prescribed by the Act for the collection of abandoned property, and for the prevention of frauds in the insurrectionary districts of the United States, passed March 3, 1863, 12 Stat. 863. *It is confined to cases arising under that Act.*

2. That the petition was not filed in the Court of Claims within six years after the cause of action accrued."

The Court, then, (p. 495,) declines to determine whether or not the cotton in this suit was

"Captured or abandoned within the meaning of the act upon that subject, and that hence the limitation in that act has no application to this case. Our view renders it unnecessary to consider this point. The only question to be considered is whether the action is barred by the limitation of six years in the Court of Claims' act before referred to." (Sec. 1069.)

The entire scope of the contention of the Claimants in that case was two-fold in its character; that either

1. Their case was in no sense under the Captured and Abandoned Property Act, but was at common law, "for money had and received;" or,

2. If not maintainable in that view, then it was brought under Paragraph 4, of Sec. 1059, under the general jurisdiction of the Court, and was thereby not only relieved from the two years' bar of the Captured and Abandoned Property Act, but was also brought within the saving clauses of Sec. 1069, and that they were within one or more of those clauses.

The effect and substance of the Court's reply to these positions was :

1. That Paragraph 4, in Sec. 1059, did not by its own vigor take any case which belonged to the peculiar and statutory class, defined and made remediable by the Act of March 12, 1863, out of that peculiar and statutory class.

2. That the Claimants did not bring themselves within any of the exceptions to the six years' bar of Sec. 1069.

The Court, therefore, decides the case as one which could not be maintained, unless it could be under the general jurisdiction the Court has over causes of action arising upon contract express or implied; and it could not be maintained under that class, because more than six years had elapsed since the right of action accrued, and the Claimants were not within any of the exceptions of Sec. 1069.

The following words, at the conclusion of the opinion in that case, show that the case went off wholly upon the principle last stated; because these words could not apply to a right of action under the Act of March 12, 1863. The Court, after stating, at page 495, that the two years' limit of the Captured and Abandoned Property Act is confined to cases arising under that Act; and at p. 496, that the claim accrued in 1865, and that the petition was filed in March, 1872, more than six years after, adds these significant words:

"During all this period the appellants could easily have put the *proper machinery* of the law in motion. The delay is not accounted for."

It is impossible for the Court to have applied this language to that case, if the case was being dealt with as one prosecuted under the Captured and Abandoned Property Act, because under that Act no suit was possible after Aug. 20, 1868, which was only three years after the right of action accrued to the Claimants; and was not six years, as the Court here states, as the period the Claimants had within which to "put the proper machinery of the law in motion."

The practical result of *Clark's Case*, so far as it bears upon the case at bar, is to confirm *Haycraft's Case* as to the exclusive character of the rights

created and the remedy accruing under the Act, and the consent therein given.

IV.

THIS IS AN ACTION UPON A RIGHT CREATED BY THE POSITIVE REQUISITIONS OF A STATUTE, AND FOR A LIABILITY OF A CHARACTER NEW TO JURISPRUDENCE, AND SO NOT SUBJECT TO THE OPERATION OF ANY OTHER BAR OF LIMITATION THAN THAT WHICH IS APPLIED BY THE STATUTE ITSELF.

To elaborate another point presented in the Synopsis:

If it be contended that under the Captured and Abandoned Property Act, and the proceedings therein authorized, the Government is liable, it must be upon one of two grounds.

It is a liability to pay to the owner of captured or abandoned property the sum found to have accrued from the sale of property he owned at the time of its seizure either from money it holds *in trust*, or *de bonis propriis.*

If the liability be to pay from money held in trust, it is because, by the terms and intent of the Statute declaring and affixing the liability, an Express Trust has been created: *and to such a trust limitation is no bar.*

Consent to suit, conferring jurisdiction on the Court, having been given for a limited period by the Act, and after the expiration of this period, Congress having conferred that jurisdiction anew over the claims of Erwin, "which otherwise could not have existed," the right of this Appellant to maintain this action is clear and unrestricted. *The Court is authorized to hear the case upon its merits:* the merits are the consideration by the Court of the questions: (1)

Is the Claimant entitled to the proceeds of cotton the property at the time of its seizure of Robert Erwin? and, (2) Are the proceeds thereof in the fund in the Treasury? *Erwin's Case*; *Ford's Case supra*.

But if the liability be to pay *de bonis propriis* then again it is because it is imposed directly by the Special Act; and such a debt is in the nature of *a specialty*, and the action for its recovery is not subject to any other limitation than such as is provided by the Statute.

The rule is thus stated: "It has been long established that where the liability of the defendant is created not merely by the act of the parties, but by the positive requisitions of a Statute, the plaintiff is not barred." *Angell on Limitations*, Sec. 80.

Wood on Limitations in Sec. 36, 38, (citing 61 Pa. St. 369; 63 Pa. St. 475; 66 Pa. St. 404,) says in illustration: "Thus where property was taken under a Statute, which also provides a remedy for the assessment of consequential or other damages, the Statute does not apply."

The Court of Appeals of Maryland takes the same view,—*Ward* v. *Reeder*, 2 H. & HcH. 154; *French* v. *O'Neale*, Id. 401. 404; *Newcomer* v. *Keedy*, 20 Md. 25; and it is so held in *Lane* v. *Morris*, 10 Geo. 162; *Pease* v. *Howard*, 14 Johns. 479, and many other cases, some of which are noted in our preliminary Synopsis, ante, p. 10.

The question has frequently arisen in this country in cases under Statutes authorizing condemnation of land for railroad purposes, and giving a right of action for damages therefor. The Reports of the Supreme Court of Pennsylvania, in a series of cases, fully illustrate and enforce the doctrine; and it is recognized and enforced by the Supreme Court of

the District of Columbia in the recent case of *Dixon* v. *B. & P. R. Co.*, 1 Mackey, 83, 84; S. C. 3 Am. & Eng. R. Cases, 205.

It is this principle which underlies the opinions of the Court of Claims in *Fendall's Case*, 16 C. Cls. 120, and *Webb's Case*, 20 Id. 499; and of this Court in *Ford's Case*, 116 U. S. 217, in saying:

"Every claim cognizable by the Court of Claims must be determined with reference to the limitation prescribed for claims of the class to which it belongs, unless Congress, by Statute, otherwise directs."

These views establish beyond question that as to the original Act, the limitation of Sec. 1069 was not applicable.

The Special Act grants jurisdiction anew, and under the provisions of the Act of March twelfth, eighteen hundred and sixty-three, entitled," &c., of the claims of Erwin. As expressed in *The Aurora*, (7 Cranch, 382,) "the renewal of the Act must be held to be in such force and effect as it had at the time of its expiration." The intention, it is said in *Erwin's Case*, of the Special Act, was to relieve the case from the bar of limitation, and give the Court jurisdiction to hear the case upon its merits.

The force of this argument is greatly increased by recalling the fact that the Special Act was passed, not only after the two years' limit of the Captured and Abandoned Property Act had closed jurisdiction against these claims, but *more than six years after that bar had attached.* As Congress must be held to have passed the Special Act with knowledge of all legal defences existing, its enactment without affixing a new period of limitation must be construed as indicating the intention to send this case—these claims—to the Court to be heard upon the merits, relieved of *every* bar of limitation. Such we hold is

the construction given the Act in *Erwin's* and in *Ford's Cases.*

V.

THE RIGHT OF THE APPELLANT TO MAINTAIN THIS ACTION, AND THE POWER OF THE COURT TO ENTERTAIN JURISDICTION OF HIS SUIT, ARE CLEARLY SHOWN BY THE OBVIOUS AND NECESSARY INTERPRETATION OF THE SPECIAL ACT.

The Special Act says the Court of Claims may take jurisdiction of the claims of Erwin, under the provisions of the Act of March 12, 1863. Its purpose, as declared by this Court in *Erwin's Case,* was to revive a jurisdiction then lost, or as in *Ford's Case,* to relieve from the bar of limitations, to the end that it might be heard upon its merits, the suit upon these claims. And this suit was to be under the provisions of the Captured and Abandoned Property Act.

"That Statute furnishes a complete system for the prosecution of claims under it, and defines the extent of the rights which those who claim an interest in the proceeds of property captured or abandoned during the civil war may assert against the Government." *The Elgee Cotton Cases,* 22 Wall. 185.

This Court has determined that the rights which Erwin acquired under the Special Act passed to his Assignee—the Appellant;. and, as by that Act, jurisdiction was conferred anew upon the Court, and without any limitation of time; and as that jurisdiction was special,—that is, under the provisions of the Captured and Abandoned Property Act,—the jurisdiction thus conferred authorizes the Court, in respect of the claims of Erwin, to determine them in its customary manner and by its established

machinery; for, as is said in *Zellner's Case*, (9 Wall. 248,)

"They are to proceed in the usual way to to hear and adjudicate upon the question of ownership and right to the proceeds, according to the proof and law of the case." See also *Tillson's Case*, 100 U. S., 46.

It was determined in *Erwin's Case* that he was the owner of certain cotton which was seized and sold under the original Act, and the proceeds thereof were paid into the Treasury; that being adjudicated a bankrupt after the seizure and before his suit, the right to the proceeds of such seizure and sale passed to his Assignee.

Substituting his Assignee, who is,—and who alone was and is,—legally entitled to demand and receive these proceeds, for the owner at the time of seizure, the Special Act, as construed by this Court, says in effect to the Court of Claims: "Consent is given that you may consider the claims of Robert Erwin, as if the bar of two years had not run against him: and if it be proven to your satisfaction that he was the owner of cotton which was seized and sold, and the proceeds thereof deposited in the Treasury, you may decree in favor of the person legally entitled thereto, the repayment of such proceeds. The recognition of the right inthis case is dependent only upon satisfactory proof of the conditions originally attached to the subject matter.

If the limitation of Sec. 1069 had ever applied to a case under the original Act, it, too, was waived, by the Special Act; for it was passed, not only more than two years after the close of the war, but more than six years after the limit of that Act, and nearly twelve years after the cause of action first accrued. Congress having waived the bar of one Statute,

would be assumed to have waived the other,—and all others, also, had any others been applicable; and having conferred jurisdiction anew, without affixing anew the limitation specially applicable,—and the only one, in respect of all the reasons of the law which could be applicable,—to now apply that "Statute of repose" which attaches to cases falling under the general jurisdiction of the Court, is for the Court to legislate where Congress has forborne to do so.

This is the manifest, the unavoidable interpretation of the Act; and it is wholly consistent with the principles of interpretation expressed in a number of these peculiar cases, and with those adopted by this Court in *Cross* v. *U. S.*, 14 Wall. 483; *U. S.* v. *McKee*, 91 U. S. 442.

The reason for the limitation of two years originally attaching has ceased to operate; and there is no point of time dependent upon the conditions which gave rise to the original Act, from which to date a new period of limitation. The reasons for the general limit of Sec. 1069, of six years, could not apply on any proper ground: for this is not a case of liability *de bonis propriis*, but the restoration to Claimant of the proceeds of property, of title to which he was never divested, but as to which for war reasons the Government became, by its own act, the Trustee for the person entitled,—as said by this Court, in *Padelford's Case*, 9 Wall. 543:

"Holding the petitioner's property for his benefit, and having been fully re-imbursed for all expenses incurred in that character, loses nothing by the judgment, which simply awards to the petitioner what is his own."

VI.

TO THE RIGHT OF ACTION CREATED BY THE SPECIAL ACT, FEB. 5, 1877,—AN ACT WITHOUT A PERIOD OF LIMITATION EXPRESSED,—THE LIMITATION OF REV. STAT. SEC. 1069, DOES NOT APPLY.

The Special Act revives, for the benefit of the claims of Erwin, the Captured and Abandoned Property Act, *by conferring jurisdiction upon the Court over his case which otherwise could not have existed.* There would have been a right, *created by a statute*, but without a remedy, but for that Act.

The Act of March 12, 1863, was itself a Special Act. It dealt with a subject matter wholly new to jurisprudence. Had it not conferred jurisdiction specifically upon the Court of Claims, or some other Courts, although it had recognized the rights of owners of property seized to the return of the proceeds of their property from the fund in the Treasury, no Court could have entertained a suit to recover. This is distinctly declared in *Hayeraft's Case.*

The right being special and peculiar, a like special and *limited* remedy is created; and while no forms of procedure are prescribed, the power of the Court is very definitely limited. It is charged with finding, as essential to a decree in favor of a claimant, "that the property captured and abandoned, came into the hands of a Treasury Agent; that it was sold; that the proceeds of the sale were paid into the Treasury of the United States; and that he was the owner of the property, and entitled to the proceeds thereof." *Ross's Case*, 92 U. S. 282; *The Elgee Cotton Cases*, 22 Wall. 198.

The jurisdiction thus conferred is special, and the

Court is limited to finding the facts thus prescribed. *Ex-parte Atocha*, 17 Wall. 439; *Great West. Ins. Co.* v. *U. S.*, 112 U. S. 199; *Townsend* v. *Little.* 109 U. S. 112.

The Court of Claims is thus invested with jurisdiction to decree the restoration of these proceeds; not because it is the tribunal established for the trial of causes involving the liability of the Government upon its contracts express or implied with individuals; not because it is liable in any ordinary way for the payment of money; but because the Court, being one of the agencies of the Government, and it being necessary to determine the facts essential to the restoration of these proceeds; and the Government *as Trustee* being interested in limiting the return to the persons only who were declared to be entitled, (*Woodruff's Case,*) has by the Act conferred upon it the power and duty of adjudging upon satisfactory proof the right to such restoration.

The policy of the Act has been herein fully considered, as it is declared by this Court; and it may be here remarked that *until now* and in *this case* there has been no practical conflict between the views of this Court and those of the Court of Claims.

In the jurisdiction thus created, the Act provided for the identification of the owner, by requiring proof of ownership, and of title to the proceeds. This being done the right to restoration depended upon but two things: proof of loyalty; application within two years.

At the date then of the Special Statute, Feb. 5, 1877, it was incumbent upon Erwin, in order to procure the return of the proceeds of his property, to prove to the satisfaction of the Court, 1, his ownership, 2, his right to the proceeds. These and these only were the conditions imposed upon him. It

certainly will not be contended that if *he* had delayed filing his petition, under the Special Act, until now he would be debarred; for the purpose of the Act was to secure to him the return of the proceeds of his property, if any such there were, and the only limitation upon his right was waived in his behalf for the reason assigned in the Special Act. This, in effect, is said by Ch. J. Drake in *Ford's Case*, 19, C. Cls. 518, hereinbefore quoted, p. 24.

That limitation was one affixed to the jurisdiction of the Court, and not applicable to the merits of the case, or in bar of the remedy provided. The distinction between it and the limitation of Sec. 1069, which bars the remedy, must be carefully observed.

The bar of Sec. 1069 does not affect the jurisdiction of the Court, for in any case it may be necessary for the Court to entertain jurisdiction, because of, and to determine the applicability of, the exceptions which the section itself contains; *(Webb's Case*, 20 C. Cls. 493;*)* and it operates only upon the remedy.

The bar of the Captured and Abandoned Property Act is an absolute limitation of the right of action, operating upon and divesting the Court of power to hear the case under any circumstances, *and without any exception to its operation.*

The reasons for the limitation of Sec. 1069 are such as attach to all remedial procedure.

Those of the limitation of jurisdiction, under the Captured and Abandoned Property Act, grew out of the conditions and the necessities of the war, in the existence of which the Act had its origin. At the time of the enactment of the Special Act these reasons had ceased to exist; but there remained to be developed the future policy of the Government in respect of a trust estate held by it for some of its

own citizens. The original Act imposed no limitation which was intended to bar or conclude the right, or to raise a presumption of the prescriptive acquisition of title, by the Government, to the property so seized or the fund arising from its sale. So far as it had such a policy or deemed it necessary it provided a method in the Confiscation Acts, (*Winchester's Case*, 99 U. S. 375.) In the new experiences thrust upon it by the war, a policy limited to a fixed period was adopted. There was nothing to guide action, and the plan proposed was for the hour; for it could not be known what would be the fund, or how many would avail of the Act and its beneficent offer. In authorizing the extension of pardon, Congress must be presumed to have contemplated the restoration of these proceeds to many,—to all who had been disloyal; and so the distribution under the Act of the entire fund. No policy was declared, therefore, as to such part of the fund, if any, as might remain and accrue, because of the failure of claimants to succeed either in proof of ownership or loyalty, or by delay in preferring their claims. No general policy was then declared, nor has any been declared since then.

But in respect of the claims of Erwin, the only power authorized to declare the policy of the Government has,—as has been frequently said by this Court, and by the Court of Claims, in referring to the Erwin Act,—declared as a part of its policy, that his failure having been without his fault, he shall lose nothing thereby; and so has given consent that the proceeds of his property shall be restored to the person entitled thereto, if it be proven satisfactorily to the Court of Claims that any part of the property

owned by him is, by the proceeds of its sale, a part of the fund in the Treasury.

The person entitled thereto is he who, at the time of the passage of the Special Act, was the legal representative of the legal rights of Erwin existing *in jus* or *in re* at the time of his bankruptcy, Dec., 1868. The right of the Assignee, notwithstanding the provisions of Sec. 5057 of the Revised Statutes, as we have shown above, is clearly and unquestionably settled.

In conclusion of the second ground submitted:

The result, therefore, of what we have said in regard to the present point; namely, Whether as against the right of action given by the Special Act, of Feb. 5, 1877, the six years' limitation prescribed by Sec. 1069 is applicable, may be summarized thus:

1.—It is already settled by the decision of this Court, in the case of Erwin, that the intent and effect of the Special Act is to give a right of action to the proper party under and in accordance with every provision of the Captured and Abandoned Property Act, except only that the Special Act relieved the *Erwin Case* from the two years' limitation of that Act.

2.—Whilst the Special Act thus removes a special bar of two years which had been applicable to that case, and to those of its class, and authorized and required a decision of the case *on its merits*, it did not in express terms enact any new bar of limitations which should be applicable to the new right of action thus created.

3.—From these two propositions it results that the present case is in Court, under the Captured and Abandoned Property Act, with every right of recovery and every quality and incident attached by

law to cases prosecuted under that Act, save that the Act giving the tight of recovery creates no Statutory bar by way of limitation.

These three propositions, neither of which is now susceptible of contradiction, bring us to the question, whether it will be intended, inferred or implied, as a matter of mere interpretation or construction of such a Statute, that when it is admitted to be designed to create a special right of recovery, in a trial upon the merits, in an individual case; and when such Special Statute is admitted to be intended to remove from that case a special two years' limitation, that the Statute, which has thus removed one bar, was designed to create and subject the case to another and distinct Statute of Limitations of six years, to which limitation no case of that class had ever, in the history of our legislation, been subjected.

The contention that it was the design so to subject this case to the six years' limitation, is negatived by the following considerations:

1. And we here adopt, and state the argument in the words of the Court of Claims, in *Webb's Case*, 20 C. Cls. 440:—

"A class of cases made subject to a provision as to the time within which they must be prosecuted, are thereby taken out of the general Statute of Limitations." (*Fendall's Case*, 16, C. Cls., 120.) See also, *Ford's Case*, 116 U. S. 217.

2.—It is no answer to this to say that the Special Act created no special limitation for it, and that, therefore, the action under it is not one having a special bar of its own, because it is not taken out of the class which had attached to it the special two-years' bar; since the decision of this Court is, that

the case remains one essentially and in law and fact prosecuted under the Captured and Abandoned Property Act, with no difference than that it is relieved from the two-years' bar. Hence it is a case belonging to a class which had a two-years' bar, and to which the six-years' bar never applied. Its relief from the two-years' bar has not taken it out of the class to which it belonged, it still being prosecuted under the Act covering that class,—*a class to which by no Act of Congress, has the six-years' bar ever been applied.*

ALBERT SMALL,
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of Counsel for Appellant.

Additional Notes for Appellant,

BY

CHARLES MARSHALL,

(of Baltimore,) OF COUNSEL.

It is believed that the questions presented in this appeal have been substantially settled by this Court in *Ford* v. *U. S.*, 116 U. S. 216.

In that case, the Court has taken the Erwin Act,—Act Feb. 5, 1877,—as an illustration of the legislation which is effectual to put such a case as this before the Court of Claims, to be heard on its merits, freed from limitations of any kind, in the exercise of the power, which it is said Congress possesses, to place one claim of this kind on a better footing than another.

The following considerations may seem to be unnecessary; but they are respectfully submitted, by the undersigned, out of deference to the adverse judgment of the Court of Claims. They are views suggested mainly by the more complete and exhaustive argument of his colleagues.

I.

Assuming that the benefit of the Act of Feb. 5, 1877, entitled "An Act for the relief of Robert Erwin," enured to the Appellant, his Assignee in Bankruptcy in whom the claim was vested, as decided by this Court in *Erwin* v. *U. S.*, 97 U. S. 396,

it is submitted that *no Statute of Limitations is applicable to the right conferred by that Statute.*

This will appear from a consideration of the legal nature of that right. And in ascertaining the intent of this *private Statute*, the rule established by this Court, as applicable to the interpretation and application of such Statutes, must be borne in mind. In *Lessees of Pollock* v. *Kibbe*, 14 Pet. 353, 361, it is said:

"The Act of Congress under which title was claimed being a private Act, for the benefit of the City of Mobile and certain individuals, it is fair to presume it was passed with reference to the particular claims of such individuals and the situation of the land embraced within the law at the time it was passed."

It is settled that the only right that ever existed to receive from the Treasury the proceeds of Captured and Abandoned Property, is that created by the Act of March 12, 1863. *Haycraft* v. *U. S.*, 22 Wall. 98.

There is no implied promise on the part of the United States to return these proceeds. This Court has also described the right arising under that Act as being the "concession of a privilege." *U. S.* v. *Anderson*, 9 Wall. 67. It is also settled that the neglect or failure of the owner of such property to avail himself of that privilege within the time limited by the Act, operates to bar the right created by it altogether, so far as the Courts are concerned. Speaking of a similar claim, this Court has said:

"The demandant in this case neglected to avail himself of the remedy provided, and consequently he is now without any. *That* remedy was the only one of which the Court of Claims, or any other Court, has been authorized to take jurisdiction.

"It is for Congress, *and not for the Courts*, to

determine whether this jurisdiction shall be extended, and other remedies provided." *Haycraft's Case, supra.*

If the original right was only a "privilege conceded," and conceded upon a condition non-compliance with which would forfeit the right, we can best understand the object and legal effect of the Act for the relief of Erwin by considering the condition of his claim, after his failure to secure the benefits of the provisions of the original Act. This Court thus describes the status of the claim under such circumstances.

"Demands against the Government, if based upon considerations which would be valid between individuals, such as services rendered or goods taken, are property, although there be no Court to investigate and pass upon their validity, and their recognition may depend upon the caprice or favor of the Legislature." *Erwin* v. *U. S.*, 97 U. S. 396.

It thus appears that Erwin never had any enforceable right to the money at all, except under the express promise of the United States made by the Act of March 12, 1863, and upon the trusts and conditions therein prescribed; and having lost that right by neglect, there was no implied promise on the part of the Government to pay him, and "the recognition and payment" of his claim had come to "depend upon the caprice or favor of the Legislature." The object of the Erwin Act was, therefore, to restore to the owner of his claim the privilege that had been extended before by the Act of 1863, and lost by neglect.

The renewal of the offer of that privilege was not a matter of right, on his part; but was, aside from the trust nature of the fund, an act of grace on the part of Congress.

Such being the nature of the right arising under the Act of Feb. 5, 1877, it is urged that for the Court to impose upon it any limitation which Congress has not expressly imposed, is repugnant to the very nature of the right itself.

The Act itself contains no limitation. It was an Act of free, unrestrained grace and favor on the part of Congress; and it is contended that to rights of this kind, arising solely from the free and liberal concession of a privelege by Congress, and based upon no contract, no limitations are applicable, except such as accompany the concession, and are made part of the terms and conditions of its bestowal.

In passing the Act of Feb. 5, 1877, Congress manifestly intended to deal more liberally with Erwin's claim than it had dealt with like claims arising under the Act of March 12, 1863, *in one important respect at least.* All claimants under the latter Act, had been required to apply for the benefit of its provisions within two years from the suppression of the rebellion. No such condition is exacted by the Erwin Act. Congress in passing it, has done what this Court has said in *Haycraft's Case* it might have done in 1863.

Speaking of the limitation of two years contained in the Act of March 12, 1863, the Chief Justice says, in that case:

"Provision might have been made for the institution of suits by loyal owners at any time, but it was not."

The Court proceeds to suggest the reasons for the two-years' limitation of the Act of 1863, and it may be that when Congress came to pass the Act of 1877, the reason for the limitation imposed in 1863

having ceased, no such condition was attached to the right thus restored. Be this as it may, Congress saw fit to prescribe no time within which suit should be brought in the Court of Claims under the Erwin Act. So far as the right to sue under that Act is concerned, it resembles the right conferred upon the owner of property sold for non-payment of the Direct Tax, to demand the return of the surplus proceeds of such sale, under the Act of Aug. 5, 1861, ch. 45, as declared by this Court in *U. S.* v. *Taylor*, 104 U. S. 216, where the Court says:

"The fact that six or any other number of years had passed did not authorize him to refuse payment. The person entitled to the money could allow it to remain in the Treasury for an indefinite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years he was not required to sue for it within that time."

Nor is there any question as to the right of Congress to put one claim of this kind upon a better footing than another, if it so wills.

This Court, in speaking of the power of Congress in this class of cases, says:

"It is undoubtedly within the power of Congress to place claims referred to that Court by the Senate or by the House of Representatives, on a better footing than other claims, by providing that they may be determined upon their merits, without reference to lapse of time, or any previous bar of limitation. *Ford's Case, supra.*

It is therefore submitted that when Congress, possessing such absolute discretion in dealing with claims of this kind; free to give or withhold the right to prosecute them; free to put one claim on a better footing than another,—exercises that right out of its mere grace, in the form of the concession of

such a privilege, the imposition by the Court of any Statute of Limitations upon a right so conferred is repugnant to the very nature of the right. *The Court cannot limit an act of grace which the Sovereign has seen fit to confer without limit.*

Unquestionably the Act of Feb, 5. 1877, removed all previous bars that had accrued against the claim under any Statute of Limitations; inasmuch as, whatever difference there may be as to the application of any of the limitations mentioned in the argument, it is certain the claim was wholly barred by all of them when the Erwin Act was passed. When Congress, therefore, authorized the Court of Claims to take jurisdiction under the Act of March 12, 1863, nearly twelve years after the claim accrued, and seven years after the jurisdiction of the Court had ceased, and re-opened the Court to this claim, without any limitation contained in the Act, it must be concluded that it could only have intended that it should be treated, not as a *contractual right* against which the ordinary Statute of Limitations applicable to claims of that kind runs, but as a concession or favor that is not subject to any limitation or qualification, except such as Congress may attach to the concession.

II.

But it is respectfully submitted that even if limitations would begin to run against the right conferred by the Erwin Act, the limitation of six years, imposed by Rev. Stat. sec. 1069, would have no application to claims arising under the Captured and Abandoned Property Act.

When the Act of March 12, 1863, was passed, there

was an Act of March 3, 1863, sec. 10, identical with Rev. Stat. sec. 1069.

The Act of March 12, 1863, was passed while the war was raging, and the date of the suppression of the rebellion was a matter of conjecture. It might have been suppressed and the war ended legally Aug. 20, 1866, or it might have been ten years later. But claims under that Act might have accrued at any time after March 12, 1863, and by the terms of the Act, they could have been presented to the Court of Claims at any time within two years from the suppression of the rebellion, no matter when they accrued. A claim "accrued" when the proceeds of a sale first reached the Treasury: but it could be preferred in the Court, under the Captured and Abandoned Property Act, at any time within two years after the suppression of the rebellion. The time of filing the claim in the Court, under the Act of March 12, 1863, was wholly independent of the limitation prescribed by Section 10, of the Act of March 3, 1863.

It happened that the war ended in 1866; but it might have happened that the end was in 1876. It is manifest that Congress did not consider the limitation of Sec. 10, Act of March 3, 1863, as applicable to claims arising under the Act of March 12, 1863. *The effect of a law does not depend upon accidents, unless it is so expressly provided.*

We confidently argue, therefore, that when the right to sue in the Court of Claims for the proceeds of Erwin's cotton, under the Act of March 12, 1863, was revived by the Act of Feb. 5, 1877, the six years' limitation of Sec. 1069 had no more application to that right, than the limitation of Sec. 10, of the Act of March 3, 1863, would have to the same claim as it

originally stood under the Act of March 12, 1863.

The case of *Clark* v. *U. S.*, 99 U. S. 493, is not at variance with this view; as that was not a case under the Act of March 12, 1863, but one in which the Claimant relied upon a contractual right to the money, outside of the right conferred by the Captured and Abandoned Property Act. To such a case of contractual right the six years' limitation of course applies.

III.

The limitation of two years imposed upon suits "between an Assignee in Bankruptcy, and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such Assignee," (Rev. Stat. sec. 5057,) has no application to the right arising under the Act of Feb. 5, 1877.

It is contended that the Act does not refer to suits of this kind between the Assignee and the United States. The latter will not be considered as embraced in a statute unless it so expressly, or by necessary implication, appears.

Section 5057, being strictly a Statute of Limitations, does not destroy the right, but only takes away the remedy. If the claim in this case be regarded as a suit to recover a debt, it is contended that the Statute would operate only in favor of the United States; and the restoration of the remedy by the Act of Feb. 5, 1877, would be a waiver of the bar of the Statute. THAT WAIVER WOULD CONTINUE UNTIL THE PERMISSION TO SUE BE WITHDRAWN.

ERWIN'S ACT IS NOT A NEW PROMISE TO PAY AN OLD DEBT, BUT A RIGHT TO USE A LOST REMEDY.

IV.

But assuming that the six years' limitation of Sec. 10, of the Act of March 3, 1863; or the two years' limitation of Rev. Stat. sec. 5057; or the six years' bar of Sec. 1069, could apply to a right to sue under the Act of March 12, 1863,—which we respectfully deny, —it is submitted that none of these limitations can apply to a case like the present.

When the Erwin Act was passed, the claim was barred under each of the three limitations above mentioned, if they applied to it.

All of them begin to run from the time a claim accrues. None of them apply to a claim that has once accrued and become outlawed, and is afterwards revived by such an Act as the Erwin Act.

There is no Statute of Limitations that runs against the claim once barred and afterwards revived by law as this claim was. *The right to pursue it by the owner can only be taken away by the authority that granted this right.*

CHARLES MARSHALL,
of Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM 1886.

No. 1269.

LEPINE C. RICE, Assignee, Appellant,

vs.

THE UNITED STATES, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTARY BRIEF – REPLY TO APPELLEE— FOR THE APPELLANT.

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J. M. WILSON,
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IN THE

Supreme Court of the United States.

October Term 1886.

LEPINE C. RICE, Assignee,
vs.
THE UNITED STATES. } No. 1,269.

Reply to Appellee's Brief.

Since preparing the appellant's brief in this case, and before submitting the cause under Rule 20, we have been, by the kindness of the Attorney-General, favored with an inspection of the brief for the Government.

In looking through it, counsel for claimant do not find any point made therein to which they care to make reply beyond what is in their original brief, with the exception of the point which, in substance, alleges that the present action is based upon a right created by the special act of February 5th, 1877, (19 Stat. L., p. 509,) and that hence, the right of action is barred by section 1069, because that section bars all rights of action which are created by or founded upon any law of Congress.

The brief for the Government does not make it absolutely plain whether the Attorney-General designs to say that the present right of action is a claim "founded upon" the said special act of February 5th, 1877, or, on the other hand, upon the Captured and Abandoned Property Act, (act March 12, 1863,) or whether it is "founded upon" both of these.

We think, however, he means that the present "*claim*" is "founded upon" the special act of February 5th, 1877, and not upon the Captured and Abandoned Property Act. For example, at the top of page 7 of his brief he says:

"Erwin had neither *right* nor remedy until the special act became a law."

Here, therefore, there is apparently an averment that this "claim" is one depending for its existence, as well as for the measurement of its character and extent, upon the special act and not upon the Abandoned Property Act.

If this is not what the Attorney-General's brief means, and if, on the contrary, it means that this "claim," as a claim or actionable *right*, is founded upon—grows out of—or is created by the Abandoned Property Act, and takes its life, characteristics, and dimensions from that act, revived in favor of Erwin's claims for the purpose of their determination and enforcement, then we agree with the Attorney-General, for this is precisely what we assert.

We may restate our position in this regard, as follows:

1. The distinction is radical, and is of substance, between the creation of a right, or a claim, by means of an act of Congress—such claim not existing before or independently of the act—and the creation of *jurisdiction* for the recovery of a claim whose existence was not dependent upon such jurisdictional act, but existed independently thereof.

This distinction between the creation of a *right* by a statute, and the creation of *jurisdiction*, or a *remedy*, is thoroughly recognized and familiar, and is thus expressed in *Haycraft's Case*, 22 Wall., 98, where, speaking of the Captured and Abandoned Property Act, this court says:

"But the same statute which authorized the capture gave a *right* to certain persons to demand and receive a restoration of their property taken. Coupled with the *right* to demand was a provision for the *remedy* by which it was to be enforced."

It is, therefore, plain that it is the Captured and Abandoned Property Act, which, for the purposes of this case, brings into existence the things which are called in the first clause of section 1059, "*claims* founded upon any law of Congress."

2. The special act of February 5th, 1877, does not attempt or profess in any degree to create any claim, as distinguished from the creation of jurisdiction. On the contrary, its words are express—that the jurisdiction which it creates is "of the claims of Robert Erwin," as created and defined by the Captured and Abandoned Property Act. *This the statute in express terms declares.*

So that this statute simply recognizes a claim of Erwin brought into being by said Captured and Abandoned Property Act, but of which jurisdiction in the court had been lost, as the statute also in express terms declares, "by accident or mistake of his agent or attorney, and without fault or neglect on his part," by not filing the claim within the time limited by the original act. (See Special Act, Rec., p. 2.)

And so, also, is it expressly held by this court, in *Erwin's Case*, 97 U. S., 395, where it is said, in enforcing this view, that the right and prosecution were dependent upon and governed by the Captured and Abandoned Property Act. "It was not intended to enlarge or affect his title to the claim, or to change his position in court from what it would have been had he instituted his suit within the two years prescribed by that act. His claim must, therefore, be considered like the claims of other suitors, both with respect to its original validity as a demand against the Government, and with respect to his title." The same is held in Ford's Case. (See Brief, page 18.)

3. Hence, since it is demonstrated from the face of these acts that the claim or right here sued for is one brought

into existence by the Captured and Abandoned Property Act, and not by the special act; and since the special act simply revives a jurisdiction lost without fault, therefore the claim belongs to that special class of statutory rights and remedies covered by the Captured and Abandoned Property Act, and which had a limitation of its own, and does not come within the meaning of the first clause of section 1059, defining the general jurisdiction, as distinguished from the special jurisdiction of the Court of Claims.

The result of the aforegoing is, therefore, this: that, although this case is, in one sense, a claim founded upon a law of Congress, yet it is one founded upon a law which creates not only the *right*, or the "claim," but also prescribes for the class its own specific remedy and limitation. And it is for this reason that the six years' limitation, applicable to claims generally, coming under the general jurisdiction of the court, has no application here.

As to this point the authorities cited in our brief (pp. 10, 11) are conclusive, and need not be repeated.

The mistake, as seems to us, of the Attorney-General is in making that clause of section 1059, giving jurisdiction of "claims founded upon any law of Congress," to be applicable to a special jurisdiction, created by a special act, which simply revives jurisdiction, but does not create the foundation of any claim.

The first clause of section 1059 is confined to cases where the act of Congress makes the foundation of the right or claim, and constitutes no special class having its own methods of recovery and special limitation.

The present claim being, as already shown, founded upon the Captured and Abandoned Property Act, made a special class, having its own jurisdiction and limitation, cannot be brought under the general six years' limitation,

which is applicable to cases prosecuted under the general jurisdiction of the court.

We venture to add to the suggestions in our original brief an illustration and proof of our proposition, which is, even taken by itself, absolutely conclusive on this point, that it was not the design of Congress in passing the original act to subject prosecutions under that act to the general statute of limitation. The illustration is this:

This act of March 12th, 1863, was passed in the midst of the civil war, and when Congress did not and could not know when would occur the event named in said act, to wit, "the suppression of the rebellion." That event Congress knew might not occur for six or more years after the date of the act. Yet it enacted that suits under that act might be commenced "at any time within two years after the suppression of the rebellion." And this for proceeds received into the Treasury at any time during the rebellion, whether before or after the date of the act. Hence, manifestly, if the suppression of the rebellion had occurred July 4th, 1868, any claimant under the act could commence his suit at any time before July 4th, 1870, although his cause of action accrued the day after this act took effect, to wit, March 13th, 1863. This is simply self-evident. Therefore, in this case the six years' limitation could not have been designed by Congress to be applicable. Yet when Congress passed this act, at the very darkest period of the rebellion, it is impossible to aver that it did not contemplate the possibility that the rebellion would not be suppressed within four years after the date of the act.

It is, therefore, a demonstration that during all the life of the act, prior to the suppression of the rebellion, it contemplated and took within its purview cases where the right to sue was projected into the future an undetermined and indeterminable number of years, which might and most probably would exceed four years from the date of

the act. Nobody can say of the act that it did not authorize a prosecution at any time, either during the rebellion or within two years after its suppression, although that time might far exceed six years from the date of the deposit of the proceeds of sales sued for in the Treasury. This much is literally indisputable. And during the continuance of the rebellion, nobody can predicate of this law that its voice was one commanding that no prosecution should be commenced under it, except within six years after receipt of the money by the Treasury.

But laws do not have one meaning to-day and a different meaning to-morrow. They are not subject to one limitation to-day and another to-morrow. This proposition is so thoroughly familiar and settled as to have been a maxim of the law from the beginning: *Lex uno ore omnes alloquitur*, (2 Inst., 184.) The law not only speaks to all persons, but at all times, with one mouth.

Hence, if the court applies the six years' limitation to this Abandoned Property Act in this case, they will apply to it a limitation which would have been literally impossible of application to any case brought under the act within two years from the suppression of the rebellion, although that two years expired ten years after the cause of action accrued.

We cannot see how it is possible, therefore, to give this statute this duplexity of voice, this change of signification, making it mean one thing in one event and at one period, and a different thing in another event and at another period, and this when the statute is express in forbidding such change of sense, and in making its meaning as to the limitation and everything else to be the same meaning in all events and at all time.

Therefore we respectfully and confidently submit that this action, depending as it does for the foundation of its claim upon the original act, is one belonging to a special

class, where the only limitation applicable is the two years' limitation applied *to the class;* and that limitation being removed by the special act, no new and different limitation will be imported into the class from the class of limitations applicable to the general jurisdiction of the court.

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In the Supreme Court of the United States.

OCTOBER TERM, 1886.

LEPINE C. RICE, ASSIGNEE, APPELLANT,
vs.
THE UNITED STATES, APPELLEES.
No. 1269.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

LEPINE C. RICE, ASSIGNEE, APPELLANT,
vs.
THE UNITED STATES, APPELLEES.
No. 1269.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

Statement.

This is a claim for the net proceeds of a large amount of cotton alleged to have been taken from Erwin & Hardee, in Georgia, under the Captured and Abandoned Property Act, in 1864 and 1865. The case was not commenced in the Court of Claims within two years after the suppression of the rebellion.

Erwin & Hardee were adjudicated bankrupts, January 15, 1869, and R. H. Footman appointed assignee for Erwin.

Footman resigned as assignee February 23, 1877, and Lepine C. Rice, the appellant, was appointed to succeed him.

Erwin claimed to own the claims in this suit by purchase at the assignee's sale, December 7, 1872.

Erwin had commenced a suit in the Court of Claims, not, however, within the two years' limitation, and, on the 5th February, 1877 (19 Stat. L., 509), he procured the passage of a special act of Congress, which became a law by lapse of time, and reads as follows:

AN ACT for the relief of Robert Erwin.

Be it enacted &c., That the Court of Claims may take jurisdiction under the provisions of the act of March 12, 1863, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," of the claims of Robert Erwin, of Savannah, Ga., for property alleged to have been taken from him, which claims were, by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act.

Erwin proceeded to prosecute his claim under such special act (13 C. Cls. R., 49–62), and the court dismissed his petition, for reasons therein stated, which in no way affect the questions in this appeal. The judgment of the Court of Claims was affirmed by the Supreme Court (97 U. S., 392–397).

This ended litigation upon these claims until February 17, 1886, when the appellant filed his petition as assignee in bankruptcy in the Court of Claims, averring that he was entitled to recover the net proceeds of the cotton, as such assignee in bankruptcy, under the special act passed by Congress for the relief of Robert Erwin.

A motion was filed on behalf of the appellees, and also a general demurrer, by which the question of jurisdiction was raised. The Court of Claims, after hearing argument of counsel, dismissed the petition for want of jurisdiction, Judge Nott dissenting, and the claimant appealed to the Supreme Court. (21 C. Cls. R., 413–429.)

BRIEF OF ARGUMENT.

The appellant has assigned but one error, namely, that the Court of Claims applied in bar of his right of action the limitation of section 1069, Revised Statutes. The appellees relied on three propositions below, which are correctly stated in the opinion of the Court of Claims, as follows:

> (1) It is argued that the act under which the suit is brought was, in the words of the title, "For the relief of Robert Erwin," and not for his creditors through the assignee in bankruptcy *previously appointed*, and that the latter acquired no rights thereby, both because it, the act, was not intended for him (*Strong* v. *Hopkins*, 2 Paine, 584), and because the right to sue was a valuable right or privilege acquired after the appointment of the assignee, and did not pass by the assignment.
>
> (2) It is also argued that an assignee in bankruptcy has no right to keep the estate open and bring actions nine years after his appointment. (Rev. Stat., sec. 5057; *Bailey* v. *Glover*, 21 Wall., 346; *Walker* v. *Towner*, 4 Dillon, 165.)
>
> We express no final opinion on these two points, although we are inclined to think that one of them, at least, is well taken. They merit serious consideration and could not be passed by did we not prefer

to rest our decision upon the third objection, which concerns more particularly the jurisdiction of this court. But they will all be open to the defendants in the Supreme Court on appeal, if the case should go there.

(3) The third objection is that the claim, under the act of 1877, accrued more than six years before the filing of the petition, and so is forever barred by the following section of the Revised Statutes, which was held by the Supreme Court in *Haycraft's Case* (22 Wall., 81, and 10 C. Cls. R., 108) to be jurisdictional:

"SEC. 1069. Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues:

"*Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

I.—THE SIX-YEARS' LIMITATION.

Inasmuch as the decision of the Court of Claims depends upon the third objection of the defendants below, we shall present our reasons and authorities in support of that objection first.

By section 1059, clause first, Revised Statutes, it is provided that the Court of Claims shall have jurisdiction to hear and and determine the following matters:

(1) *All claims founded upon any law of Congress.* * * *

That the claim in this case is founded upon a law of Congress we think will be admitted.

Jurisdiction of the claims was originally granted to the Court of Claims under the *Captured and Abandoned Property Act* (12 Stat. L., 820). but Erwin failed to file his petition within two years after the suppression of the rebellion and thereby lost his remedy.

All rights and remedies accruing to claimants for captured and abandoned property are founded on laws of Congress.

Congress has, in many instances in its legislation consenting that the United States may be sued in the Court of Claims, incorporated into the act a bar of limitation of its own, and whenever such bar of limitation has not been abrogated or repealed, the courts, no doubt, have applied the special bar during the time such act remained in force, in preference to the general statute of limitation.

To illustrate: The act of July 4, 1864, conferring jurisdiction on the Quartermaster-General to pass upon claims for stores and supplies, has its own limitation. (1 Supp. Rev. Stat., 481; 20 Stat. L., 650.)

The same may be said of the acts conferring jurisdiction on the commissioners of claims. (17 Stat. L., 577.)

The original Captured and Abandoned Property Act had its limitation of two years, and may be said to have become obsolete or inoperative by reason thereof on and after June 20, 1868. (12 Stat. L., 820, sec. 3.)

In all such cases as were filed in the respective courts or tribunals under these acts the prescribed special limitations applied.

We have been unable, however, to find a reported case in which special legislation of Congress has been procured for the purpose of granting relief in the matter of individual claims, or of removing a statute of limitation and reviving an original act for the benefit of an individual claim and claimant, the special act containing no limitation of its own, as in the case at bar, in which the general statute of limitation (Rev. Stat., § 1069) has not been applied.

Such claims are founded upon laws of Congress, come within the general jurisdiction of the Court of Claims (sec. 1059, Rev. Stat.), and are controlled by the general statute of limitation (*ibid.*, sec. 1069). In support of this contention, see *Hukill* vs. *United States*, 16 C. Cls. Rep., 562–569; *Jordan* vs. *United States*, 19 *id.*, 108–120; *Marshall et al.* vs. *United States*, 21 *id.*, 307–310; *Blount* vs. *United States*, 21 *id.*, 274–282.

It is important, therefore, to ascertain and determine the effect of the private act for the relief of Robert Erwin.

The Supreme Court, in *Erwin* v. *United States* (97 U. S., 394, 395), say in relation to this special act:

> The purpose of the statute passed for the relief of the appellant, as is manifest on its face, was to remove the bar of the Captured and the Abandoned Property Act, which had risen without his fault, *or rather to confer jurisdiction upon the Court of Claims over his case, which otherwise would not have existed.*

The same doctrine is affirmed in *Ford* vs. *United States.* (116 U. S., 216, 217.)

The effect of the special act for the relief of Erwin was, then, to confer a new grant of jurisdiction, by the revival or re-enactment, as of the date of such special act, of the original Captured and Abandoned Property Act, *minus* the bar of limitation. Erwin had neither right nor remedy until the special act became a law. His claim, if he had one, *accrued* on that day, under a statute without a special limitation of its own. Such claim accrued by virtue of a law of Congress. It was clearly a claim *founded upon a law of Congress*, under section 1059, Revised Statutes.

It is just as clearly barred by section 1069, Revised Statutes.

The claim in this case first accrued, therefore, on February 5, 1877, and took the status of a claim founded upon a law of Congress on that day. (19 Stat. L., 509.)

This is the position taken by the appellees, and, if tenable, the claims in this case are barred because they were not presented to the Court of Claims within six years after they first accrued. (Sec. 1069, Rev. Stat.)

It certainly could not have been the intention of Congress to have granted Erwin unlimited time for the presentation of his claims.

If the Captured and Abandoned Property Act had been passed originally without the two years' limitation, or without any limitation whatever, could it be reasonably contended that the six years' limitation of section 1069 would not have applied? Most assuredly not.

All of the claims that originally accrued under such act were claims founded upon a law of Congress, in which

there was a specific limitation other than that under the general jurisdiction of the Court of Claims.

In the absence of such special limitation in the act, as in the case at bar as now presented, the general rule of limitation must apply and prevail.

The appellant, Rice, assignee, filed his petition in the Court of Claims February 17, 1886, more than nine years after the claims first accrued under Erwin's special act. We submit that the claims not having been filed in the Court of Claims within six years after they accrued under the law, are now barred by section 1069, Revised Statutes.

If the views of counsel for appellant are correct, then claimants in two-thirds or more of the claims referred to the Court of Claims by special acts have unlimited time in which to begin their prosecution. But as Congress, by section 1059, Revised Statutes, has granted the Court of Claims general jurisdiction of "all claims founded upon any law of Congress," without distinction as to whether such claims shall be founded upon special or general statutes, it is evident that such views are erroneous. The jurisdiction of the Court of Claims being purely statutory the acts of Congress conferring upon it jurisdiction, and restricting the same by limitation, must be consulted upon the subject instead of the text-books.

When such reference is made to the statutes relating to the powers of said court, it will be easily discovered that the claims in this case have no other foundation than a law of Congress which brought them within the general jurisdiction, and, consequently, within the general limitation statutes.

The counsel for appellant makes an extract from the

opinion in *Webb & Co.'s Case* (20 C. Cls., 494), as follows:

> A class of cases made subject to a special provision as to the time within which they must be prosecuted, are thereby taken out of the general statute of limitations.

Other authorities are cited upon the same point. The law is sound, but it cannot be applied to the case now under consideration.

The doctrine was announced in connection with cases in which the jurisdiction of the Court of Claims attached under the Captured and Abandoned Property Act, while it furnished a complete system for the prosecution of such claims, *with the two years' limitation in force,* and in relation to which such act had not become obsolete and inoperative.

Appellant's case does not come within such rule. The statute under which he is compelled to prosecute his claim is not made subject to a special provision as to the time within which it must be prosecuted. In order to have a day in court it was necessary for him to have the very special provision removed upon which the rule rests.

He is in court upon a law in which his case is not made subject to a special provision as to the time in which the same must be prosecuted, and therefore *his case does come within the general statute of limitations.*

It is urged on behalf of appellant that the special act has conferred upon the courts some sort of *nunc pro tunc* jurisdiction.

Extracts are made from *Erwin's Case* (97 U. S. R., 392), and also from *Ford's Case* (116 U. S. R., 216) to show

the purpose of the special act for the relief of Erwin "was to remove the bar of the Captured and Abandoned Property Act. * * *" (Brief, p. 18.)

Notwithstanding it has been successfully shown that the bar of the statute of limitation of the original act has been removed by the special act, it is claimed that the same decisions expressly show the Erwin act was designed to require Erwin's claims to be determined *as if they had been begun within the two years named in the Captured and Abandoned Property Act.* (Brief, p. 15.)

If Congress intended for Erwin's claims to be determined as if they had been begun within the two years' limitation of the original act, why was it necessary to say anything about removing such bar?

As stated in the opinion of the Court of Claims (Rec., p. 8), the appellant invokes the general statute (sec. 707, Rev. Stat.) as to his right of appeal to the Supreme Court, but at the same time denies the right of the appellees to apply the general statute of limitation. We think the court below has succinctly stated the law, as follows:

> There is no distinction in principle between the application of the right of appeal under section 707 to special acts of legislation subsequently passed, and the application of the limitation of section 1069 to such cases. (Rec., p. 8.)

The opinion of the Court of Claims covers this point so thoroughly and absolutely that it is not necessary to do more than call the attention of the appellate court thereto. (Rec., 8, 9.) The authorities from which quotations are made, and which are cited in that opinion in

support of the ruling, are as follows: *Zellner's Case*, 9, Wall., 244; 7 C. Cls., 137. *McKee's Case*, 8 Wall., 163; 10 C. Cls., 208. *Erwin's Case*, 97 U. S., 392; 13 C. Cls., 49. *Clark's Case*, 99 U. S., 493; 11 C. Cls., 702.

It may be observed, therefore, that to hold because the special act itself contains no limitation, no limitation whatever applies, would be to overrule a well-established line of decisions.

It is insisted that Congress intended to favor Erwin in the passage of the special act, and the following extract from Ford's Case is relied on to show Congress had such power, to wit:

> It is undoubtedly within the power of Congress to place claims referred to that court by the Senate or by the House of Representatives on a better footing than other claims, by providing that they may be determined upon their merits, without reference to lapse of time, or any previous bar of limitation. (*Ford's Case, supra.*)

Such right of Congress undoubtedly exists, and is not disputed. But it is disputed that Congress intended to put Erwin's claim on a better footing than other claims. Congress has not expressed any such intention in the act in regard to the claim, and the same cannot be presumed or implied. The object of the act was to legislate as to previous and not future limitation. It is a simple grant of jurisdiction to the Court of Claims to hear and determine Erwin's Case under the law, without other or further expressed privileges.

II.—As to the express trust.

The appellant's counsel have devoted much time to the discussion of the proposition that limitations do not run against an express trust. The proposition deserves some attention. The act itself (12 Stat. L., p. 830, sec. 3) only provides that the loyal owner who brings himself within the requirements thereof may, after certain deductions, receive the residue of the proceeds.

Upon the question of trust the opinion of the Court of Claims, delivered by Chief-Justice Richardson, is complete and explicit. In *Haycraft* v. *United States* (22 Wall., 92–98) the Supreme Court refers to its former decisions upon the same subject, and says:

> The act of Congress looked to its preservation, but authorized its capture. In so doing Congress acted within its constitutional power to "make regulations concerning captures on land and water." (Art. 1, sec. 8, par. 11.) In the indiscriminate seizure which was likely to follow such an authority, it was anticipated that friends as well as foes might suffer. Therefore, to save friends, it was provided that any person claiming to have been the owner might, at any time within two years after the suppression of the rebellion, prefer his claim, and, upon proof of his ownership and loyalty, receive the money realized by the United States from the sale of the property.
>
> *That expresses all there is of the trust or the remedy provided.* * * *

We do not think the act itself declares an express trust. Nor do the decisions declare such trust, as will be seen by Haycraft's Case. The fund has never been recognized as belonging to any of the well-defined and specific trusts

mentioned in the authorities. The statute expresses all there is upon the subject. The fund, therefore, is anomalous, both as to its origin and character, and its status depends upon the interpretation that may be given the statute, of which nothing similar "is mentioned in history" (*Haycraft's Case*, 22 Wall., 95). The statute does not, we think, establish such an express trust as is contended for by counsel for appellant.

A fund created from property captured by force of arms in war, and which is in the possession of the Government without the owner's consent, subject to arbitrary disposal, appears to be a queer trust. The legislation of Congress never created, nor was it intended to create, an actual and express trust out of such a fund. It is in the Treasury of the United States, and remains there, not awaiting the *repudiation of a trust* by the United States as intimated, but awaiting the action of Congress in declaring the *policy* to be pursued in the disposal of the same. The policy of the Government must ultimately control, and the fund may be confiscated if such a policy may be agreed upon. It is a strange trust fund in which the trustee has the power to confiscate, as a matter of policy, the trust fund in its possession and control.

We agree with Chief-Justice Richardson in what he says upon this subject with reference to the decisions of the Supreme Court, and more especially with reference to Haycraft's Case, to wit.

> This certainly does not recognize much of a trust. It is no more so than is that upon which every person holds the property which is exclusively his own—to be managed as he sees fit, and to be disposed of as

> he pleases. In such a trust, if that be not a misnomer, the special principles of equity do not apply, and courts of equity do not interfere.

Reference has been made to Taylor's Case (104 U. S., 216–222), which arose under the direct-tax acts (12 stat. L., 292, 422, 640; 14 Stat. L., 568). The direct-tax acts and the Captured and Abandoned Property Act (12 Stat. L., 820) are not similar, and do not admit of the same construction.

Section 36 of the direct-tax act (12 Stat. L., p. 304, sec. 36) requires the surplus proceeds of the sale to be paid to the owner of the property or his legal representatives; or if such owner cannot be found or refuses to receive the surplus, then it shall be deposited in the Treasury of the United States to be held for the *use* of the owner or his legal representatives, until application shall be made therefor to the Secretary of the Treasury, who, upon such application, shall by warrant cause the same to be paid.

It will be observed that the act is without special limitation as to the Treasury Department, and hence the claimants may make application for such surplus at any time.

By way of construction of this act, the Supreme Court have said, in Taylor's Case, as follows:

> Prior to his application to the Secretary of the Treasury for that surplus, such owner has no claim thereto which can be enforced by suit against the United States.
>
> The statute of limitation runs from the date of the application.

Claims for the surplus, therefore, do not *accrue* upon the passage of the act, but upon application for the surplus

to the Secretary of the Treasury. They are claims that first *accrue* upon demand at the Treasury, and from the date they so accrue the general statute of limitations commences to run against them. No special jurisdiction is conferred upon the Court of Claims by the direct-tax acts, but when demand is made for the surplus, the claim accrues and the general jurisdiction of said court applies as well as the general limitation of six years. (See *United States* v. *Lawton*, 110 U. S., 146–151.)

The jurisdiction to hear and determine the claims for captured and abandoned property, which *accrued* by virtue of the statute, was conferred on the Court of Claims. The statutes controlling the two classes of claims are materially different. But in either case they are claims founded upon laws of Congress. The direct-tax claims accrue upon demand. The claim at bar accrued, if at all, upon the day the special act for the relief of Erwin was passed and approved. Neither act contains a special limitation of its own. Each act answers its respective purpose, which is, when claims have accrued thereunder, to authorize the Court of Claims under its general jurisdiction, as well as its general statute of limitations, to hear and determine the same.

We submit, therefore, that no such express trust has been created by either the direct-tax acts, the original Captured and Abandoned Property Act, or the special act for the relief of Erwin in revival of the latter act, as will avoid the general statute of limitations. (Sec. 1069, Rev. Stat.)

III.—Assignee in bankruptcy is barred.

We come now to the second objection made in the court below, namely, that an assignee in bankruptcy has no right to keep the estate open, and bring actions nine years after his appointment. The bar of limitation in this instance in found in the Revised Statutes, section 5057.

In *Bailey* vs. *Glover*, 21 Wall., 346, the Supreme Court of the United States, Justice Miller delivering the opinion, held as follows:

> This is a statute of limitation. It is precisely like other statutes of limitation and applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee, where the interests are adverse and have so existed for more than two years from the time when the cause of action accrued, for or against the assignee. Such is almost the language in which the provision is expressed in section 5057 of the Revised Statutes.
>
> It is obviously one of the purposes of the bankrupt law that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual mode of trial attended by some necessary delay. Appeals in some instances must be taken within ten days, and provisions are made to facilitate sales of property, compromises of doubtful claims, and generally for the early discharge of the bankrupt and the speedy settlement of his estate. It is a wise policy, and if those who administer the law could be induced to act upon its spirit, would do much to make the statute more ac-

ceptable than it is. But instead of this the inferior courts are filled with suits by or against assignees, each of whom as soon as appointed retains an attorney, if property enough comes to his hands to pay one, and then, instead of speedy sales, reasonable compromises, and efforts to adjust differences, the estate is wasted in profitless litigation and the fees of the officers who execute the law.

To prevent this as much as possible, Congress has said to the assignee, you shall commence no suit two years after the cause of action has accrued to you, nor shall you be harassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be nearly settled up and your functions discharged, and we close the door to all litigation not commenced before it has elapsed.

In *Walker, assignee,* v. *Towner* (4 Dill., 165), it is held:

> A suit by an assignee in bankruptcy to collect debts or claims due to the estate must be brought within two years from the time when the cause of action accrued to the assignee.

No reasons can be presented to show the case at bar does not come within the ruling in the above decisions.

IV.—Relief granted by the special act.

The first objection made in the court below is, that the act under which the suit is brought was in the words of the title, "For the relief of Robert Erwin," and not for his creditors through the assignee in bankrutpcy *previously appointed,* and that the latter acquired no rights thereby, both because it, the act, was not intended for him (*Strong* v. *Hopkins,* 2 Paine, 584) and because the right to sue

was a valuable right or privilege acquired after the appointment of the assignee, and did not pass by the assignment.

The act was passed for the sole relief of Erwin, and, no doubt, upon the representation to Congress that the claims belonged to him. The claims, says the act, "were, by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act."

The points presented to the Supreme Court by Erwin in his action under the special act were (1) that his claims never passed to the assignee in bankruptcy; (2) that he afterwards became the owner of the same by purchase. (*Erwin's Case*, 97 U. S., 395.). It is a reasonable inference therefore, that if he asserted he owned the claims in his suit under the special act, that he also made like representations to Congress in securing the passage of such act, and that the same was passed upon the faith of such representations.

The act in terms provided for Erwin's relief. It extended to him and to him alone. Congress may have been willing, for reasons which to it were good and sufficient, to remove the bar of the limitation provided in the Abandoned and Captured Property Act, and extend to him the privilege to bring a suit in the Court of Claims. That court, it is respectfully submitted, ought not under this act to take jurisdiction and adjudicate upon this case in the interest and for the benefit of persons unknown to Congress. At the time the act was passed Congress had in mind Robert Erwin and *his* claims. The assignee brings this suit in the interest of persons—creditors—who were

unknown to Congress when the act was passed. The act, both in its letter and spirit, was passed for Robert Erwin. How can the court say that Congress would have passed the act for the benefit of the assignee representing the creditors?

In *Ogden* v. *Strong, administrator* (2 Paine, 585), it is said:

> Where, therefore, the title of an act of Congress directing moneys to be paid out of the Treasury to a widow and her children, was entitled "An act for the relief of the widow and children of B. W. H," and there was nothing in the act from which a trust could fairly be raised, nor any intimation that the appropriation was intended for any other than their own private benefit, it was held that the moneys must be considered as given to the widow and children in their own right, and not as assets to go to the creditors of B. W. H. (See also *United States* v. *Saunders*, 22 Wall., 492.)

This ruling is, we submit, exactly in point. It was the intention of Congress to give relief to Robert Erwin and none other.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

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DECEMBER 22, 1886.